No. 14-6873	*** CAPITAL CASE ***
Title:	Mark A. Christeson, Petitioner
	v.
	Don Roper, Warden
Docketed:	October 27, 2014
Linked with 14A445	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(14-3389)
Decision Date:	October 24, 2014
Discretionary Court	
Decision Date:	October 22, 2014

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 27 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 26, 2014)
Oct 27 2014	Application (14A445) for a stay of execution of sentence of death, submitted to Justice Alito.
Oct 27 2014	Brief of respondent Don Roper, Warden in opposition filed.
Oct 27 2014	Brief amici curiae of Former Federal and State Judges filed. (Distributed)
Oct 27 2014	Brief amici curiae of Ethics Bureau at Yale, et al. filed. (Distributed)
Oct 28 2014	UPON CONSIDERATION of the application of counsel for the applicant and the response filed thereto, IT IS ORDERED that the parties are directed to file supplemental briefs by 2:00pm today, October, 28, 2014, regarding whether the record shows that petitioner has authorized Attorney Jennifer A. Merrigan, or Attorney John R. Mills, or Attorney Joseph J. Perkovich to move on his behalf for substitution of counsel appointed pursuant to 18 U. S. C. 3599.
Oct 28 2014	Reply of petitioner Mark A. Christeson filed.
Oct 28 2014	Supplemental brief of respondent Don Roper, Warden filed.
Oct 28 2014	Supplemental brief of applicant Mark A. Christeson filed.
Oct 28 2014	Application (14A445) referred to the Court.
Oct 28 2014	Application (14A445) granted by the Court. The application for stay of execution of sentence of death presented to Justice Alito and by him referred to the Court is granted pending the disposition of the petition (14-6873) for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Scalia, Justice Thomas, and Justice Alito would deny the application for stay of execution.
Nov 3 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 10 2014	DISTRIBUTED for Conference of November 14, 2014.
Nov 17 2014	DISTRIBUTED for Conference of November 25, 2014.

Dec 1 2014	DISTRIBUTED for Conference of December 5, 2014.
Dec 8 2014	DISTRIBUTED for Conference of December 12, 2014.
Dec 29 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 12 2015	DISTRIBUTED for Conference of January 16, 2015.
Jan 20 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
	Judgment VACATED and case REMANDED (Opinion per curiam). (Detached Opinion).
	Justice Alito, with whom Justice Thomas joins, dissenting. (Detached opinion).
Feb 23 2015	JUDGMENT ISSUED.

RECORD
AND
BRIEFS

FILED
OCT 27 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 14-6873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

MARK A. CHRISTESON

Petitioner,

v.

DONALD ROPER, WARDEN,

Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

Imminent Execution Scheduled
12:01 a.m. CDT on October 29, 2014

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QUESTIONS PRESENTED FOR REVIEW

1. Does an actual conflict of interest meet the "interests of justice" standard established in *Martel v. Clair*, 132 S.Ct. 1276 (2012), and require substitution of conflict free counsel for conflicted counsel appointed under 18 U.S.C. §3599?

2. Whether counsel appointed under 18 U.S.C. §3599, who procedurally defaulted the client's federal habeas application by untimely filing the petition, should continue their court appointment and determine the existence of, and plead, their own abandonment and/or egregious misconduct warranting equitable tolling of their client's statute of limitations under *Holland v. Florida*, 560 U.S. 631 (2010)?

PARTIES TO THE PROCEEDING

Petitioner is Mark A. Christeson, who was Petitioner-Appellant below.

Respondent is Donald Roper, Warden of Potosi Correctional Center, who was Respondent-Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark A. Christeson respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued a summary affirmance of the decision of the District Court for the Western District of Missouri. The district court's decision is on pages 374a-377a of the Appendix. The court of appeals' summary affirmance is on pages 447a-448a of the Appendix.

JURISDICTION

On October 21, 2014, counsel of record entered her appearance in the district court for the limited purpose of moving that court for substitution of 18 U.S.C. §3599 appointed counsel and filed that motion on Petitioner's behalf. App. 341a, 344a. The district court denied that motion on October 22, 2014. App. 375a. Petitioner appealed the same day. App. 379a. The Eighth Circuit summarily affirmed the district court on October 24, 2014. App. 448a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. §3599(a) provides, in relevant part: "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys."

28 U.S.C. §2244(d)(1) provides, in relevant part: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

I. MR. CHRISTESON'S APPOINTED COUNSEL CONCEALED THE DISMISSAL OF HIS UNTIMELY FEDERAL HABEAS PETITION FOR NINE YEARS YET THE LOWER COURTS NOW REFUSE TO REPLACE THE CONFLICTED ATTORNEYS TO PERMIT LITIGATION OF EQUITABLE TOLLING

Mark Christeson is the only man on Missouri's death row to have been denied any federal review of his trial court judgment. He faces his imminent execution with an, at best, simplistic understanding of the collapse in his legal process, having been told only on May 4, 2014 the basic fact that his federal case had been dismissed over seven years earlier.

Mr. Christeson's federal district court-appointed attorneys abandoned him before his one-year habeas corpus statute of limitations had run out in April 2005, failing to even meet him for the first time until six weeks after that deadline and then filing his petition nearly four months out of time. Earlier this year, the appointed counsel expressly acknowledged, in both the Missouri Supreme Court and the United States District Court for the Western District of Missouri, the existence of their conflict of interest against Mr. Christeson concerning his grounds for equitable tolling of the statute of limitations.

But the lower federal courts, first alerted to this conflict on May 23, 2014, months before the setting in September of Mr. Christeson's execution date, have repeatedly refused to substitute counsel for the appointed lawyers who abandoned Mr. Christeson, filed his petition long out-of-time, and then concealed their failings in the ensuing years. For nearly a decade, appointed counsel obscured their abandonment surrounding the April 2005 deadline by exploiting their client's profound mental incapacity and isolation within his prison.

In April 2014, in the throes of Missouri's current wave of executions, Mr. Christeson's appointed counsel finally solicited consultation on their default of his federal habeas corpus review. Instead of offering candor, appointed counsel's subsequent conduct advanced their reputational interests over Mr. Christeson's legal interests, bringing their unmistakable conflict of interest to light.

Months of briefing in the district court and court of appeals culminated in the district court's denial of Mr. Christeson's motion for substitution of counsel. Yet that order, while invoking the "interests of justice" standard articulated in *Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012) (Kagan, J.) (unanimous), studiously avoided speaking to the entire point of the months of proceedings, *viz.*, appointed counsel's conflict of interest with Mr. Christeson. Before this Court is the Eighth Circuit's order summarily affirming that district court order of October 22, 2014. The decisions below bind Mr. Christeson to his conflicted counsel, who have clung to their appointment in order to litigate zealously in the interest of their professional reputations and at the expense of Mr. Christeson's precarious legal interest.

II. THE FEDERAL STATUTORY RIGHT TO COUNSEL IS MR. CHRISTESON'S ONLY SAFEGUARD

Mr. Christeson remains indigent, as he had been throughout his entire state court proceedings. The Missouri State Public Defender System provided his counsel for his trial, direct appeal, and state collateral review. Section 3599 of Title 18 of the U.S. Code codifies the right to counsel for prisoners "who seek federal habeas relief from a state death sentence, for all post-conviction proceedings and related activities." *Clair*, 132 S.Ct. at 1283-84, citing *McFarland v. Scott*, 512 U.S. 849, 854-55 (1994), *Harbison v. Bell*, 556 U.S. 180, 183-85 (2009).

In 2004, the last public defender to represent Mr. Christeson in state court prepared and filed for him in the district court a nominally *pro se* motion for the appointment of two St. Louis area solo practitioners, Eric Butts and Phil Horwitz. The district court granted their appointment under 18 U.S.C. §3599. Virtually every capital federal habeas petitioner in Missouri obtains their counsel this way, as reflected in the fact that counsel of record for each of the ten men executed in Missouri in the past eleven months were appointed pursuant to §3599.[1] Butts and Horwitz promptly abandoned Mr. Christeson, not even meeting with him for the first time until more than *six weeks after his petition's filing deadline* had passed, nearly eleven months after their appointment.

Absent funding from within the §3599 scheme, it is impossible for Mr. Christeson to replace appointed counsel with volunteer lawyers in order to investigate and litigate the bases for reopening his federal habeas case with a Rule 60(b) motion concerning the equitable tolling of the limitations period. This would be true in relation to a garden-variety case, but Mr. Christeson's is anything but that, as his observable cognitive impairments require significant expert services in order to begin to adequately determine their extent, a factor that could be decisive in the equitable tolling analysis. This utter impracticality has been compounded by the

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[1] Unlike other highly active capital jurisdictions, neither of the Federal Defender Offices in the Missouri district courts have ever had a Capital Habeas Unit. Further, in the event of a derailment of the federal capital post-conviction process, Missouri provides no alternative resource for prisoners to find a replacement by volunteer counsel. Monthly-scheduled executions since November 2013 have deeply submerged Missouri's small private capital defense bar in the swell of warrant litigation for their extant clients. The frequency of executions has even overwhelmed the Missouri Department of Corrections, necessitating establishment, effective July 1, 2014, of a Missouri Supreme Court Rule limiting the number of executions to one per month. Mo. S.Ct. R. 30.30 (revised July 1, 2014). The unrelenting wave of executions has eliminated any prospect of a qualified Missouri practitioner intervening *pro bono*, and without a substitution appointment, to repair the breach of Mr. Christeson's federal statutory right to counsel.

recalcitrance of conflicted counsel in withholding disclosure of their file, the most crucial source of information and evidence concerning the equitable tolling analysis of 28 U.S.C. §2244(d)(1).

III. After Many Years, The Condition Of Mr. Christeson's Case Came To Light

A. Mr. Christeson's Appointed Counsel Solicited Attorney Consultation In Preparing The Response To His Show Cause Order

In 2004, Mr. Christeson's petition for a writ of habeas corpus was due on or before April 10, 2005. Butts and Horwitz, however, did not file the petition until August 5, 2005, well after the expiration of the one-year limitations period. The district court dismissed the petition as untimely on January 31, 2007, noting that "Christeson does not argue that extraordinary circumstances in this case justify equitable tolling." App. 419a, 455a. The court of appeals then summarily denied a certificate of appealability on May 29, 2007. App. 456a.

On April 7, 2014, the Missouri Supreme Court entered a show cause order for Mr. Christeson concerning the setting of his execution date, calling for his response by May 7, 2014, as the court had repeatedly done in the weeks and months prior to issuing Mr. Christeson's

order.[2] App. 37a. It had done the same a few months earlier for another client of Butts and Horwitz, Mr. William Rousan.[3]

In recent years, Butts and Horwitz had joined Messrs. Rousan and Christeson as parties to multi-plaintiff litigation concerning Missouri's capital punishment, signing on to the efforts of the given lead attorneys. Typically, one or more of the lead attorneys in these actions were from the Death Penalty Litigation Clinic (DPLC) in Kansas City, the sole public interest law office in Missouri handling capital litigation pursuant, typically, to court appointment.[4]

Butts and Horwitz solicited consultation from capital defense practitioners about potential grounds for the equitable tolling of the one-year limitations period that they had widely missed for Mr. Christeson.. App. 10a-11a. A staff attorney from the DPLC directed them to the undersigned counsel (Ms. Jennifer Merrigan and Mr. Joseph Perkovich). App. 11a.

Over the course of several phone calls in April 2014 with Merrigan and Perkovich, Butts and Horwitz indicated they had gathered that *Holland v. Florida*, 560 U.S. 631 (2010), could

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[2] On July 1, 2013, the Honorable Mary B. Russell began her two-year term as Chief Justice of the Missouri Supreme Court. The same day, the Missouri Attorney General's Office moved that court to set execution dates for Messrs. Joseph Franklin and Allan Nicklasson. On August 14, 2013, the court entered execution warrants for both men. The court had not ordered, and the State had not carried out, an execution in approximately two and-one-half years. As scheduled, Missouri executed Mr. Franklin on November 20, 2013. Also as scheduled, the State executed Mr. Nicklasson on December 12, 2013.

Thereafter, for the men sentenced to death and considered to have exhausted their appeals, the Missouri Supreme Court began issuing orders to show cause as to why an execution warrant should not be entered. In turn, that court began setting executions at generally a four-week interval. In the first three months of 2014, Missouri proceeded to execute three men.

[3] On January 29, 2014, the high court entered a show cause order for Mr. William Rousan's execution, instructing him to file his reply by February 11, 2014. *State v. Rousan*, Mo. Supreme Court, SC79566. Messrs. Eric Butts and Philip Horwitz, solo practitioners in the St. Louis area, were counsel of record for Mr. Rousan in the Missouri Supreme Court. They filed his response. On March 21, 2014, the Missouri Supreme Court set Mr. Rousan's execution for April 23, 2014.

[4] The clinic is dedicated to the representation of capital defendants and is the only entity of its type focused on death penalty defense advocacy in Missouri. However, the office is not a capital resource center and is funded through court appointment in direct representations.

offer Mr. Christeson equitable relief from their procedural default of his federal habeas review. They recognized they could not be the attorneys to litigate the issue, as it would involve investigating and presenting evidence of their own conduct after their appointment as Mr. Christeson's counsel. Merrigan and Perkovich then agreed to travel from the East Coast to St. Louis in order to meet Mr. Christeson and to review Butts and Horwitz's file.

On April 15, 2014, in the midst of these discussions, Butts wrote Mr. Christeson to inform him that eight days earlier, the Missouri Supreme Court entered an order to show cause as to why Mr. Christeson should not be executed. The letter stated:

> **the request** by the State of Missouri [sic] **does not mean that an execution date will be set in your case anytime in the near future**. As you are no doubt aware, counsel for most of the other *Zink* [lethal injection federal] litigation plaintiffs have received similar requests within the past few days. It appears that **the State of Missouri** [sic] **is doing nothing more than administratively reviewing all of the capital cases pending in the state**.

App. 84a (emphasis added). Eight days later, as scheduled, Missouri carried out the execution of Butts and Horwitz's other capital client, Mr. Rousan, at 12:01 a.m. CDT on April 23, 2014, pursuant to the Missouri Supreme Court's March 21, 2014 warrant, entered upon its January 29, 2014 show cause order.

On May 4, 2014, at the behest of appointed counsel Butts and Horwitz, Mr. Christeson met with Merrigan and Perkovich in the Potosi Correctional Center for approximately three and-a-half hours. App. 11a. After explaining that they were meeting at the request of his appointed counsel in order to assess the circumstances of his federal habeas petition's dismissal, it became

apparent that Mr. Christeson was confused. Mr. Christeson did not know that his petition for a writ of habeas corpus had been dismissed. After explaining further that his case was dismissed in January 2007 because it was filed too late, Mr. Christeson responded that he believed that his "appeals" were ongoing. He was unaware that he had never obtained federal review of his trial.

Mr. Christeson further indicated that he had met and communicated with Butts and Horwitz only infrequently over the years since their appointment—appointed counsel would later aver to having visited Christeson on four occasions over the ten years of their appointment (App. 93a-101a)—and that for years neither attorney had accepted his phone calls.

Mr. Christeson explained that during the past two years he was helped by a fellow-inmate in writing the "main litigation office in Jefferson City" to help get his appointed attorneys to respond to him. App. 8a. Upon investigation, it was determined that the requests were to the Office of the Chief Disciplinary Counsel (OCDC), an agency of the Missouri Supreme Court responsible, *inter alia*, for investigating allegations of misconduct by lawyers. App. 8a-9a, 82a, 83a. Mr. Christeson said he had tried to express that, for years, he had great trouble in communicating with Butts and Horwitz and that his requests for information had been ignored. It later became apparent that in recent years, Mr. Christeson has attempted to obtain the assistance of multiple attorneys after Butts and Horwitz had ceased to respond to him at all.[5]

By the end of the May 4, 2014 meeting with Mr. Christeson, he asked Merrigan and Perkovich to represent him. Undersigned reiterated that although they were happy to assist his

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[5] On July 20, 2013, Mr. Christeson, with the assistance of a follow inmate, lodged a complaint with the OCDC about Butts and Horwitz's neglect. App. 9a, 82a. In March 2013 and again in December 2013, Mr. Christeson wrote the above-mentioned DPLC, the public interest law office in Kansas City, Missouri, to request the assistance of counsel. App. 9a. DPLC forwarded his letters to Butts and Horwitz. *Id.* On February 2, 2014, Mr. Christeson was assisted again in filing another complaint with the OCDC. Butts and Horwitz were notified about each of these complaints and requests. App. 83a, 101a.

appointed counsel, they were meeting with him only in order to assist his appointed attorneys in helping him. App. 12a.

B. Mr. Christeson's Appointed Counsel Demonstrated Their Actual Conflict By Pleading Against His Legal Interests

On May 5, 2014, the day after meeting with Mr. Christeson, Merrigan and Perkovich met with Butts and Horwitz in Horwitz's suburban St. Louis office to review their file and to consult with them about their forthcoming response to Mr. Christeson's show cause order, which was due on May 7. App. 37a.

Butts and Horwitz refused any review of their file, even after additional repeated oral and written requests and despite explaining to them its relevance to a claim of equitable tolling. App. 12a. They refused to discuss their conduct and performance prior to their late filing of the federal habeas petition. Instead, Horwitz provided access to a conference room containing only the files of Mr. Christeson's state court attorneys, Missouri public defenders.

During the May 5 meeting, undersigned counsel emphasized that Butts and Horwitz's response should not take a position adverse to their client and explained this meant that, as future witnesses in relation to any equitable tolling litigation, the appointed counsel should make no representations about the circumstances surrounding the untimely habeas petition. App. 13a-14a. Nevertheless, the response that Butts and Horwitz filed took positions adverse to Mr. Christeson, emphasizing their own purported diligence in a self-serving manner and possibly misleading the Missouri Supreme Court:

> Appellant's habeas petition was dismissed as untimely filed by the district court. . . . Appellant strongly believes the district court was incorrect in its calculations. Appellant, through counsel, vigorously litigated this issue both in the district court and in the court of appeals without obtaining relief. Of issue before the district court was the 31 day period that the district court did not believe [sic] was tolled for purposes of calculation of the one year filing deadline for a federal petition filed pursuant to 28 U.S.C.

> §2244(d)(1)(A). Appellant believes that he timely filed his petition for writ of habeas corpus.

App. 45a.

Butts and Horwitz's response in the Missouri Supreme Court did acknowledge their inherent conflict in relation to prospective *Holland* litigation. Butts and Horwitz explained that it was their desire "to insure [sic] that appellant has been able to pursue every possible ground of relief provided by law," including a claim they referred to as "*Holland* inquiry." App. 48a. Butts and Horwitz recognized that they "would be essential witnesses to factual questions indispensable to a *Holland* inquiry." *Id.* On this basis, they acknowledged their "[u]nwaivable ethical and legal conflicts" that prevented their ongoing representation. *Id.*

They made their request to the Missouri Supreme Court clear. According to Butts and Horwitz, new counsel had to be appointed: "Conflict free counsel must be appointed to present the equitable tolling question in federal district court. It is anticipated that the aforementioned outside counsel will expeditiously present the matter of equitable tolling to the federal district court, and upon appointment, litigate the availability of federal review as to Mr. Christeson." App. 48a-49a.

C. The Notice By Friends Filed In The District Court Submitted The Attorneys' Conflict Against Mr. Christeson Warranting Substitution Of Counsel

The acknowledgment of the conflict by Butts and Horwitz precipitated Merrigan and Perkovich's filing a notice of the conflict in federal district court.[6] App. 1a, 12a, 35a. The notice was filed pursuant to the professional obligations of undersigned counsel to address the actions of the attorneys who solicited their involvement in the capital representation of Mr. Christeson

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[6] Undersigned counsel, Merrigan and Perkovich, filed the Notice By Friends Of The Court Of Petitioner's Need For Substitution By Conflict-Free Counsel on May 23, 2014 ("Notice By Friends"), acting as "Friends of the Court in Behalf of Petitioner, Mark A. Christeson." App. 1a.

but proceeded, against undersigned counsel's advisement, to conduct his representation in advancement of their reputational interests and at the expense of Mr. Christeson's liberty interest. Mo. Rules Prof. Cond., Preamble, R. 5.2, R. 8.3(a); Ann. Mod. Rules Prof. Cond. §1.7. App. 137a. The intention was to notify the court of the need to substitute conflict-free counsel.

Although Butts and Horwitz initially recognized their conflict of interest, after the notice to the district court of the conflict, their position changed dramatically. Ever since the notice, Butts and Horwitz have vigorously defended their conduct (and inaction) in relation to Mr. Christeson, and opposed the substitution of counsel. App. 101a-104a. Despite newly maintaining the position that no substitution is required and despite being aware, since April, of the necessary step of bringing a Fed.R.Civ.P. 60(b) motion, they have done nothing to vacate the judgment dismissing Mr. Christeson's habeas action. *See Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005) (Rule 60(b) motion may challenge ruling dismissing §2254 as time-barred).

D. Mr. Christeson's Case Presents Prima Facie Grounds For Equitable Tolling

1. The Available Record Reflects Attorney Abandonment When Mr. Christeson's Federal Petition Was Due

On May 14, 2004, promptly following the conclusion of state post-conviction review (*infra* at 18-19), the Missouri public defender then representing Mr. Christeson filed a nominally *pro se* motion in the Western District of Missouri for the appointment under §3599 of Butts and Horwitz. App. 451a. District Judge Whipple granted the motion on July 2, 2004, contingent, *inter alia*, on the submission of a budget. *Id.* On July 28, 2004, Butts and Horwitz submitted the required budget, which included a request for a neuropsychiatric expert. *Id.* The docket reflects there were no further filings for more than a year, when appointed counsel filed their out-of-time federal petition on August 5, 2005. *Id.*

Butts and Horwitz have averred that they in fact did not meet Mr. Christeson for the first time until May 27, 2005 (App. 93a), more than six weeks after their April 10, 2005 habeas deadline. It is apparent that that initial client consultation was the first action taken in the attempted resumption of their actual representation of Mr. Christeson following their extended abandonment while his one-year limitations period ran down and, finally, out.

Appointed counsel's file is critical to any determination of their actions during the time relevant to the April 10, 2005 filing deadline. Reviewing the file, especially with regard to their client correspondence and interview memoranda—*i.e.*, indicia of their contact and communication with the client—was the main impetus for undersigned counsel, upon Butts and Horwitz's invitation, traveling to St. Louis on the eve of the date for Mr. Christeson's response to the Missouri Supreme Court's show cause order. Despite that expressed purpose for the meeting, appointed counsel refused to supply any access to their file. To date, Butts and Horwitz have failed to produce any documentation reflecting communication or contact with Mr. Christeson before their acknowledged first meeting with him on May 27, 2005.

Further, in their rehearsal of communications with Mr. Christeson after they had missed his filing deadline (which they submitted in defense of their performance and in opposition to substitution by conflict-free counsel), they noted their first correspondence to him was not sent until August 15, 2005, ten days after they filed their very untimely habeas petition. App. 94a. A glance at that late federal petition betrays its gross inadequacy. The petition is 52 pages total and omits many claims that would have been properly presented via their exhaustion in the state post-conviction process.

Appointed counsel proceeded to chronicle their periodic correspondence after their first letter (on August 15, 2005), and to note their inclusion of Mr. Christeson in multi-plaintiff

actions concerning Missouri's lethal injection protocol. App. 94a-97a. Butts and Horwitz's survey of their correspondence after they procedurally defaulted Mr. Christeson's petition and their recital of actions taken in litigations other than the federal habeas case fail to address the central facts concerning Mr. Christeson's representation. Until just months ago, Mr. Christeson simply did not know that his petition had been dismissed and believed that his sporadic communication from his appointed attorneys concerned his federal case for which they were originally appointed in 2004. App. 11a-12a. Mr. Christeson's inability to reach the attorneys and to receive any information about his federal habeas case caused him to seek, guided by fellow inmates, the intervention of the bar's disciplinary authority and the death penalty public interest law office in Kansas City (*supra* at 8 n.5).

2. Without Meaningful Assistance Of Counsel, Mr. Christeson's Profound Cognitive Impairments and Low Intelligence Foreclose His Understanding And Protecting His Legal Interests

In the course of the proceedings initiated with the Notice By Friends (App. 1a), and culminating in the October 21, 2014 Renewed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel (App. 343a), *infra* at 24, the profound level of Mr. Christeson's mental impairments and his isolation within the Potosi Correctional Center emerged.

Mr. Christeson had no comprehension of the actual status of his legal proceedings. Undersigned counsel informed him in the May 4, 2014 meeting that his federal case had been dismissed seven years earlier. Mr. Christeson was unable to recall the names of any of his attorneys during his state collateral review under Missouri Rule 29.15 and on his direct appeal in the Missouri Supreme Court. 217a, 334a. Mr. Christeson could only remember the first names of his trial attorneys, but not their surnames. *Id.*

Mr. Christeson has not retained any working understanding of the significance of the April 7, 2014 Missouri Supreme Court show cause order. App 218a. His requests for legal assistance within the prison are unintelligible to the law clerks. App. 218a-19a.

That Mr. Christeson labored under substantial cognitive impairments was readily apparent to undersigned counsel from their first visit with him. App. 386a. After further interaction, Mr. Christeson's severe impairments are unmistakable. He presents marked deficits in written and verbal communication and severe impairments in working memory and concentration. He suffers chronic and severe headaches. Mr. Christeson was in special education throughout his schooling but nonetheless received primarily failing grades.

Mr. Christeson's school achievement testing largely included scores in the second and third percentile. *Id.* His school performance dropped precipitously between elementary school and junior high school, from low-average in the third grade to the first percentile in seventh grade. In recognition of Mr. Christeson's impairments, appointed counsel included funding for a neuropsychological evaluation in their budget filed with the district court. App. 451a. However, they never retained an expert or conducted even a rudimentary investigation.

After the Supreme Court's decision in *Holland v. Florida*, 560 U.S. 631 (2010), at least four federal circuits have held that a petitioner's inability to understand and protect his own legal interests can warrant tolling of the statute of limitations that Butts and Horwitz missed. *Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th 2014) (Easterbrook, J.); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). At least two others had held the same before *Holland* was decided. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009). These holdings are in keeping with the more general rule that federal

statutes of limitations may be tolled by the mental incompetence of a person who would otherwise be barred by them. *See Barrett v. Principi*, 363 F.3d 1316, 1319-20 (Fed. Cir. 2004) (collecting cases).

3. Mr. Christeson's Isolation Within Prison Enabled His Appointed Attorneys To Obscure The Procedural Default of His Federal Habeas Case

Inmates in the Potosi Correctional Center lack direct access to information about pending cases. App. 219a. Even inmates able to understand dockets and legal filings must rely on their counsel to update their status.

Any ability Mr. Christeson might have had, in general, to seek help about his case was effectively foreclosed by his experience in Potosi. The Potosi institution is distinctive among prisons housing death sentenced inmates in that those prisoners are comingled with the general prison population rather than separated on a row. Among the consequences for Mr. Christeson has been the lack of a place for him to seek out help in understanding the legal process and his representation concerning his capital case. App. 220a. The effects of this general void have been compounded for Mr. Christeson due to the nature of his conviction, which involved the murder of two children and their mother and a sex offense against the latter.[7] Mr. Christeson was twenty years old when he entered Potosi and his youth "made him a target" for predators. App. 220a-221a.

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[7] As a fellow inmate put it:

> If your case involves sex crimes with children or if you hurt children[,] that is not good. Prisoners with those types of crimes are thought of and treated worse than trash. They are frequently attacked. They are stabbed, beated to a coma, killed turned into a 'punk' (sexually), and sexually victimized in other ways. [A fellow inmate] recalls one incident in which one prisoner had a 'stinger' (a metal rod used to heat liquids) shoved into his rectum.

App. 229a-31a.

In November 2000, shortly after his arrival, he was attacked by two prisoners and sustained serious head injuries. App. 254a-56a, 264a. During the attack, he lost consciousness. Mr. Christeson was admitted to the infirmary and placed on 24-hour observation. He was then transferred to protective custody, for his own safety, where he remained for an indefinite period lasting at least 18 months.[8]

According to newspapers, a corrections officer tipped off the offenders about Mr. Christeson's crime, precipitating the severe beating. *See* "Prison Justice Takes a Pretty Nasty Turn," *The Southeast Missourian*, April 24, 2001. Further, in April 2001, the two assailants sent copies of their disciplinary paperwork and letters to the editor of the Maries County Gazette, bragging about what they had done to Mr. Christeson.

The prisoners were charged internally and sanctioned with one year in disciplinary segregation or "The Hole." "Inmates Offer Their Condolences to the Brouk Family: Currently Serving One Year in "the Hole" for Assaulting Christeson," *Maries County Gazette*, April 4, 2001. According to the prison's own policies, this length of a sentence was indicative of the gravity of the assault. Ordinary assault is a Class I infraction and carries up to 30 days in disciplinary segregation. App. 225a. Though the assailants could have been prosecuted of a Class B felony (*id.*), they were not. Their actions were essentially endorsed by prison officials. *See* "Inmates Publicize Retribution on Children's Killer," *The Southeast Missourian*, April 17, 2001. According to Missouri DOC spokesperson Tim Kneist, it was "not an unusual occurrence to

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[8] According to the prison's handbook:

> A Protective Custody Unit is housing that provides separation of offenders from the general population of the facility. If an offender can provide information which verifies the need for separation from other offenders, or if staff has reason to believe the offender's safety may be jeopardized, the offender may be housed in a Protective Custody Unit. App. 225a.

have a fight in a maximum-security prison ... The unusual part of the story is to write a letter to the newspaper and tell everybody they did this ... I read that and I just kind of shook my head. There's something new every week." *Id.*

In the years following this assault and his emergence from protective custody in or around mid-2002, Mr. Christeson repeatedly returned to protective custody for his safety. App. 222a-21a. This step, while necessary for his self-preservation, increased his isolation from sources of potential legal assistance by fellow inmates or the law library. The specialized knowledge concerning capital post-conviction litigation is well beyond the scope of experience of the law clerks in protective custody. App. 238a. In any event, the lack of confidentiality is a general and pervasive barrier for inmates sharing information about their case. This barrier is insurmountable in regard to crimes such as Mr. Christeson's. Given his initiation to the ways of Potosi via the November 2000 corrections officer-sanctioned attack, self-preservation effectively eliminated his access to assistance.

E. Appointed Counsel's Procedural Default Deprived Mr. Christeson Of His First Federal Habeas Review

1. Mr. Christeson's State Collateral Review Is Owed No Federal Deference

The breakdown in Mr. Christeson's federal representation has, to date, deprived him of his first federal habeas review of his state court judgment, a deprivation of "an important liberty interest." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). This left standing the problematic ruling from Mr. Christeson's state collateral review via the Missouri Rule 29.15 post-conviction motion proceedings. The following exceptional features of those proceedings call for federal scrutiny more so than any habeas corpus case in Missouri's federal courts since the enactment of AEDPA in 1996.

David Darnold, Mr. Christeson's trial judge, was no longer a Missouri judge after losing his re-election bid following Mr. Christeson's 1999 conviction in the Vernon County Circuit Court. Yet the recently elected circuit judge whom the voters had chosen to replace Darnold was prevented from hearing Mr. Christeson's post-conviction claims under the normal operation of Missouri Rule 29.15. Instead, the Missouri Supreme Court (by a November 16, 2001 order of Limbaugh, J.), appointed Mr. Darnold as a "Senior Judge" for the single purpose of presiding over Christeson's post-conviction motion. App. 347a. Senior Judge Darnold then disposed of Mr. Christeson's Missouri Rule 29.15 motion by signing and dating—without editing—a 170-page order entirely drafted by the Attorney General's Office. *Id.* The Missouri Supreme Court then affirmed that ruling on May 11, 2004. *Christeson v. State*, 131 S.W.3d 796 (Mo. 2004). Mr. Christeson's state post-conviction review was flawed beyond the point of vitiating any federal deference warranted by the fundamental principle of comity. *Jefferson v. Upton*, 560 U.S. 284, 287 (2010). Despite being patently unworthy of federal deference, no federal review, deferential or otherwise, was forthcoming due to Butts and Horwitz's procedural default.

However, the Missouri public defenders who represented Mr. Christeson in his state collateral review, despite the defective process, exhausted dozens of significant constitutional violations. But, Butts and Horwitz's late-filed federal petition, just 52 pages in length, would fail to plead almost all of those issues in the Missouri Rule 29.15 proceedings.

2. Mr. Christeson's First Federal Habeas Review Would Submit Compelling Grounds For Relief

Among the grounds for constitutional relief that could be considered in Mr. Christeson's first federal habeas corpus review are claims deriving from a staggering array of victimization, abuse, and exploitation from Mr. Christeson's infancy through his first 18 years of life in squalor and pathology. App. 314a. At the time of the horrific triple murder for which he and his then 17

year-old cousin and co-defendant (who testified against him in exchange for being spared the death penalty in a separate prosecution), were convicted, the two had set out once again to try to run away from the custody of their cousin, David Bolin, a man they were made to call "Uncle David."[9] App. 314a-15a. As much as any grounds presented to Missouri's federal courts in the modern death penalty era, the actual conditions of Mr. Christeson's childhood—if such a personal history can be called that—and their affects on Mark would warrant mercy. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

IV. The Opinions Below Have Not Addressed The Existence Of, And Consequences From, Appointed Counsel's Conflict Against Mr. Christeson

A. Instead Of Replacing Conflicted Counsel After Being Alerted To The Conflict, The District Court Ordered Them to Continue with Their Appointment

The Notice By Friends filed on May 23, 2014 requested appointment of conflict-free counsel and a hearing to address whether Mr. Christeson was entitled to equitable tolling. App 27a. It sought substitution by conflict-free counsel "in order to investigate and prepare a motion pursuant to Rule 60(b) presenting the grounds for equitable tolling." App. 35a. In connection with this requested substitution, the Notice By Friends sought a scheduling order for the prospective Rule 60(b) motion, an order to Butts and Horwitz to preserve their file and to produce it to substitution counsel, and to grant discovery to substitution counsel in connection with the equitable tolling issues. *Id.* Further, undersigned counsel expressed their qualification, availability, and willingness to accept substitution as Mr. Christeson's counsel.

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[9] David Bolin was the landlord for an extended web of kin living in an isolated rural compound of shacks, trailers and a broken down school bus known as "Bolin Hill." For decades, Bolin has been a sexual predator upon children and otherwise criminally abusive yet he has succeeded in obtaining custody of numerous minors, like Mark Christeson and his cousin Jesse Carter, within his extended family due to the members' various incapacities and struggles. App. 314a.

On May 27, 2014, the district court *sua sponte* redocketed the Notice as a motion for appointment and ordered the state and appointed counsel to respond. App. 70a. The district court also noted that undersigned counsel were from Philadelphia and New York and, in any event, it would not appoint out of state counsel to represent Mr. Christeson because of cost concerns. On June 3, 2014, undersigned counsel filed a Motion for Reconsideration, arguing that it was inappropriate for appointed counsel to comment on their own conflict and offering not to charge the court for travel fees and expenses. App. 71a.

After requesting two extensions, on June 16, 2014, Butts and Horwitz filed a Response to the Court's Order, emphasizing their own diligence in filing the petition (four months late) and attempting to rebut the assertion that they misled their client about his federal petition's dismissal. Appointed counsel did this by betraying the dates and content of attorney-client communications between 2005 and 2014. App. 93a-101a. Further, appointed counsel appear to credit the Notice By Friends with alerting them to "the possible existence of a mental health or psychological issue" (notwithstanding their initial–and unused–authorization for neuropsychiatric expert services and the inclusion in the state record of neuropsychiatric issues). 102a. To that end, Butts and Horwitz then misapplied *Holland v. Florida* to Mr. Christeson's case, patently undermining the pursuit of equitable tolling. App. 103a-104a.

Butts and Horwitz's pleading asserted that "counsel herein have contacted a psychologist in order to arrange for a psychological/mental health evaluation of Mr. Christeson. Mr. Christeson has advised counsel herein that he will participate in a psychological/mental health evaluation." App. 102a. It was subsequently determined that appointed counsel had not, in fact, broached this matter at all with Mr. Christeson prior to making that representation to the district

court. App. 121a. Further, Butts and Horwitz did not so engage any expert in the months after that filing of June 16.

On July 10, 2014, the district court summarily denied the "Motion to Appoint Counsel" and ordered that Butts and Horwitz "shall continue to represent Petitioner." App. 169a.

B. Undersigned Counsel Entered Limited Appearance In Order To Appeal From The District Court's Order Denying Substitution

On August 11, 2014, undersigned counsel (Merrigan) entered her limited appearance in the district court on Mr. Christeson's behalf pursuant to Mo. Prof'l Conduct Rule 4-1.2(c), for the limited purpose of appealing from the July 10, 2014 order. App. 458a. The Eighth Circuit docketed the appeal on August 12, 2014, under Appellate Case 14-2896.

On August 15, 2014, Respondent moved to dismiss the appeal, raising three grounds in as many paragraphs. Mr. Christeson timely responded on August 25, 2014. App. 171a, 175a.

On September 5, 2014, Merrigan also filed a Notice of Limited Appearance of Counsel in the Missouri Supreme Court, alerting the high court to the pendency of the foregoing litigation in the Eighth Circuit. *State v. Christeson*, Mo. Supreme Court, SC82082.

On September 8, 2014, the Eighth Circuit *sua sponte* directed the parties "to address whether Jennifer Merrigan and Joseph Perkovich have standing to appeal." Mr. Christeson timely filed the ordered briefing on September 18, 2014. App. 183a.

On Friday, September 19, 2014, the Missouri Supreme Court entered Mr. Christeson's execution warrant for 12:01 a.m. CDT, on October 29, 2014. On Monday, September 22, 2014, Mr. Christeson, through undersigned counsel, docketed a notice in the Eighth Circuit of the Missouri Supreme Court's execution warrant. App. 465a. The next day, Respondent filed a notice by the State of Missouri of the same warrant. *Id.*

On September 29, 2014, Respondent filed his ordered briefing on standing. App. 185a. Mr. Christeson moved for leave to reply supplying points and authorities in reply on October 1, 2014 and requesting expedited briefing in light of the pending execution date. App. 465a. At the instruction of the clerk, Mr. Christeson refiled, lodging a discrete reply brief of four pages on October 3, 2014. App. 194a. On October 8, 2014, the court of appeals granted leave and filed the reply. App. 465a. On October 14, 2014, Mr. Christeson moved in the Court for a remand to the district court for an evidentiary hearing based on new evidence concerning Mr. Christeson's prison circumstances. App. 211a.

On October 15, 2014, the Eighth Circuit entered an unsigned order stating, in its entirety: "The court orders that this appeal be dismissed for lack of jurisdiction because attorneys Merrigan and Perkovich lacked standing in the district court. The motions by Merrigan and Perkovich for remand and for leave to file and ex parte supplemental argument are denied as moot." App. 240a.

C. The Eighth Circuit's Dismissal for Lack of Standing Returned Mr. Christeson's Case To The District Court For Correction Of Any Jurisdictional Defect And An Immediate Return To The Court Of Appeals

The next morning, on October 16, 2014, Merrigan filed her Amended Entry of Appearance before the district court for the "limited purpose of moving the Court by her simultaneously filed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel." App. 242a. She noted that Appellant "qualifies for such limited representation under Prof'l Conduct Rule 4-1.2(d)(2) because counsel is representing him in her institutional capacity with the Saint Louis University School of Law." *Id.*

On Friday, October 17, 2014, the district court entered an order near the close of business denying the Motion for Substitution for lack of jurisdiction, noting that the Eighth Circuit had

not yet entered its mandate.[10] App. 300a. Shortly after, the Eighth Circuit formally issued its mandate pursuant to Fed. R. Civ. P. 41(a). App. 301a.

In the evening of October 17, undersigned counsel filed in the Eighth Circuit a Request for Order Directing the District Court to Accept Filing. The Request sought relief from the court of appeals because of the district court's foregoing order proscribing Merrigan from filing any further pleadings. App. 303a.

On Monday evening, October 20, 2014, Respondent filed an opposition to the foregoing Request. The next morning, on October 21, 2014, Mr. Christeson filed a Reply to the State's Opposition.[11] App. 332a. Later on October 21, the court of appeals "ordered that Attorney Jennifer Merrigan is permitted to file a renewed motion for substitution of counsel in the District Court." Immediately, Merrigan did so, filing her Renewed Amended Entry of Appearance (App. 340a), and then the Renewed Motion by *Pro Bono* Counsel for Substitution of 18 U.S.C. §3599 Appointed Counsel (App. 343a), expressly incorporating the record in the prior proceedings under the Notice By Friends (App. 349a) and, which the district court denied by an order the next day, on October 22, 2014. App. 347a. Mr. Christeson immediately noticed his appeal from that denial. App. 378a.

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[10] The district court, however, also entered the following:

> Assuming, *arguendo*, that the Court has jurisdiction, the Motion is DENIED for the reasons previously stated by the Eighth Circuit, this Court, by Petitioner's counsel, and by Respondent. The Court further finds that Merrigan's duplicative Motion is an attempt to improperly delay the proceedings in this case. Absent an Order from this Court or from the Eighth Circuit, Merrigan and Perkovich are prohibited from filing any additional documents in this case. Merrigan may, however, file a notice of appeal of this Order.

App. 300a.

[11] The reply addressed, *inter alia*, Respondent's accusations of Mr. Christeson's delay in the proceedings by pointing out that the substitution issue was presented to the district court in May, long before an execution date was set and it is Respondent who has sought two separate extensions of time before filing court ordered briefing. App. 332a.

The morning of October 27, 2014, the Eighth Circuit docketed the order summarily affirming the district court's denial now before this Court. App. 447a.

REASONS FOR GRANTING THE WRIT

The Court's recent unanimous decision in *Martel v. Clair*, 132 S.Ct. 1276 (2012), determined that district courts are to apply an "interests of justice" standard when deciding a motion for substitution of appointed counsel pursuant to 18 U.S.C. §3599. The "interests of justice" inquiry is "peculiarly context-specific," wherein the "timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint" should bear upon the decision. *Id.* at 1287. However, *Martel* posits that a "court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Id.* at 1286.

This case presents whether lower federal courts can simply flout *Martel*'s holding on the eve of a man's execution. These courts have faulted Mr. Christeson for not becoming aware of his appointed counsel's conflict against him much earlier when his attorneys effectively concealed the fact from him, exploiting his profound cognitive impairments and, due to his personal vulnerability, isolation in prison from access to viable legal assistance.

The Court should grant review in order to clarify that the "interests of justice" standard requires substitution for conflicted counsel generally and especially when the client is unusually vulnerable due to mental incapacity or otherwise, such as the Petitioner at bar.

I. The Eighth Circuit And District Court Ignored This Court's Unanimous Opinion In *Martel v. Clair* By Not Replacing the Originally Appointed Counsel Now Laboring Under an Actual Conflict

The order of the Western District of Missouri denying substitution of Mr. Christeson's court-appointed counsel recognized that the "interests of justice" standard applies to substitution

motions. App. 375a. The tortuous litigation in that court and the court of appeals since May 2014 has made the appointed counsel's conflict against Mr. Christeson unmistakable, especially given that the conflicted attorneys had expressly acknowledged their actual conflict in the Missouri Supreme Court weeks before commencement of these federal proceedings.

A. Appointed Counsel Unmistakably Labored Under An Actual Conflict

In relation to the anemic habeas petition filed 117 days out-of-time on August 5, 2005, Butts and Horwitz carry an actual conflict of interest due, on the one hand, to their professional and reputational interests concerning their conduct when they broadly missed their filing deadline in this capital case and, on the other hand, to Mr. Christeson's need to reopen his dismissed federal habeas application under any cognizable grounds.

As recognized in *Maples v. Thomas*, a "significant conflict of interest" arises after counsel misses a crucial deadline because, *inter alia*, the "strongest argument" for the client to overcome the default becomes the fact that counsel had earlier abandoned him. 132 S.Ct. 912, 925 n.8 (2012).

The actual conflict here precludes appointed counsel from litigating the circumstances of their untimely filing and equitable tolling. Specifically, the *Holland* analysis contemplates "extraordinary circumstances," 560 U.S. at 649, quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), in relation to the conduct of counsel, 560 U.S. at 652. The level of attorney misconduct under this high standard contemplates that the given attorney "violated fundamental canons of professional responsibility." *Id.* at 652-53 (citing Brief of Legal Ethics Professors et al. as *Amici Curiae* ("describing ethical rules set forth in case law, the Restatements of Agency, the Restatement (Third) of the Law Governing Lawyers (1998), and the ABA Model Rules of Professional Conduct (2009)").

Any inquiry directed to determining whether an attorney is responsible for such violations necessarily places the lawyer's interests in conflict with the client's. The specter of a disciplinary action before the Missouri Supreme Court concluding with the given attorneys being found to have violated certain professional responsibility rules would present serious concern for any practitioner. Such an action could result in sanctions such as a public reprimand and the monitoring of the given law practice. *See, e.g., In re Harris*, 890 S.W.2d 299 (Mo. banc 1994). Further, disciplinary proceedings, in extreme cases, may lead to disbarment or indefinite suspension. *In re Crews*, 159 S.W.3d 355 (Mo. banc 2005)

"A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and *adversely affected by the lawyer's own interests*." Restatement (Third) of Law Governing Lawyers (2000) §121 The Basic Prohibition of Conflicts of Interest (emphasis added).

The specific details underneath Butts and Horwitz's divergent interests from Mr. Christeson's implicate their fiduciary obligations and cause Mr. Christeson unmistakable prejudice. "When the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, then a fiduciary duty of disclosure is implicated." 3 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* §24:5 at 545 (2008 ed.), *quoted in Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009) (cited in support of withdrawal of conflicted counsel).

The absence of any inquiry into conduct during that timeframe, whether by the district court or via substitution of counsel to investigate and litigate the matter, rendered Mr. Christeson unprotected from the interests of Butts and Horwitz in obscuring their conduct from any scrutiny. *See Sallie v. Humphrey*, 789 F.Supp.2d 1351, 1364 (M.D. Ga. 2011) (ruling that counsel who

filed late federal petition must be replaced in order to permit investigation and litigation of equitable tolling issue).

Further, Butts and Horwitz not only have unwaivable ethical and legal conflicts against Petitioner in relation to the grossly missed AEDPA filing deadline. They also bear such conflicts due to their conduct *after* the dismissal of that petition.

As years elapsed following the 2007 dismissal, appointed counsel appear to have misled Mr. Christeson in their contact with him—albeit such contact by correspondence and visitation was infrequent and limited. Mr. Christeson ceased to receive information, which prompted his effort, with the help of another inmate, to write the OCDC and others (*supra* at 8 n.5).

Moreover, the impetus for these complaints—that appointed counsel had perennially failed to apprise their client of the basic legal status of his case—contravened the law governing lawyers. *See* Restatement (Third) of the Law Governing Lawyers §20 ("a lawyer must keep a client reasonably informed about the matter" and must "promptly comply with reasonable requests for information"); *see also* Restatement (Second) of Agency §381 ("an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have").

B. The Interests of Justice Dictate That An Actual Conflict Requires Substitution Of Counsel

Judge Whipple's order utterly ignores the central question posed by the Renewed Motion by *Pro Bono* Counsel for Substitution of 18 U.S.C. §3599 Appointed Counsel (App. 343a): does the capital petitioner's appointed counsel labor under a conflict against him? That question is ignored, it is submitted, because, as the foregoing indicates, there can only be one answer: yes.

The district court, and thereafter the panel of the Eighth Circuit that affirmed its order, should not escape the consequences the existence of that conflict hold for the substitution

motion: a "court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Martel*, 132 S.Ct. at 1286. *Martel* constrains the lower courts that face comparable circumstances as those here. The lower courts in Mr. Christeson's case have simply ignored the clear effect of this Court's recent unanimous opinion and this Court should grant review in order to address this abuse of the newly issued standard.

C. The Lower Courts Failed To Respect Other Interests Of Justice Criteria

Furthermore, the decisions incorrectly applied the elements of the "interests of justice" standard that they did address. The district court ruled Mr. Christeson's motion untimely because it was "not filed until 2014, and shortly before Petitioner's execution date." App. 375a-76a. While the initial motion alerting the court to a conflict and the need for substitution of counsel was filed in 2014, it was filed in May, over five months prior to Mr. Christeson's execution date and nearly four months before the date was even scheduled. App. 1a.

Mr. Christeson has been diligently attempting to obtain a substitution of counsel to replace his federally appointed conflicted counsel for the past six months, that is, since the time he learned of their conflict of interest. Though the court faults Mr. Christeson for the seven-year delay in moving for substitution, it is silent as to the source of the delay: his appointed counsel's active misleading of him about the status of his appeal and his incapability, due to severe cognitive impairments, of asserting his own rights until lawyers, asked by his appointed counsel to visit him, informed him that his federal case had been dismissed years earlier.

The district court also found that conflicted counsel did not abandon Mr. Christeson, because, according to pleadings filed by appointed counsel, they "appeared on behalf of Petitioner in lethal injection cases and made other filings on his behalf" and "state that they have had meetings and conversations with Petitioner." App. 375a (internal citations omitted). These facts were taken directly from the pleadings of appointed counsel. They are further evidence of

appointed counsel's conflict of interest; they were pled by appointed counsel in their own defense, at the expense of their client, and in violation of his attorney client privilege. App. 128a.

The district court's rationale misconstrues Petitioner's allegation of abandonment. Petitioner alleged that appointed counsel abandoned him before the time that his habeas corpus petition was due in April 2005.

According to the appointed counsel's own admissions, their first contact with Mr. Christeson was on May 27, 2005, *six weeks after* his statute of limitations had expired. Over two months after that first meeting, the appointed attorneys filed a woefully late and inadequate petition (having retained no experts, undertaken no investigation, and filed no appendix or exhibits) and then spent the next seven years deceiving their client about the status of his appeals (when they were not ignoring his queries), and strenuously arguing their own diligence at the clear expense of the client's legal interests.

Finally, the district court held that "granting the Motion would set an untenable precedent in death penalty cases. That is, outside attorneys can toll an execution date by simply waiting until the eleventh hour and then second-guessing the work of appointed counsel." R 476a.

Mr. Christeson did not wait until the "eleventh hour" to initiate the present action. He initiated it as soon as he realized his appointed counsel's conflict of interest, literally within days of learning on May 4, 2014 that his federal case had been dismissed due to counsel's abandonment in 2005 when the petition was due. Mr. Christeson has been attempting for months to litigate this issue. Any delay since the initial filing in the district court is due to the repeated extensions granted to his appointed counsel and the State and the lower court's general handling of the matter. Delay predating these proceedings is due to the conflict of interest of Mr.

Christeson's federally appointed counsel and their attempts to cover up their own misconduct and take advantage of their client's mental incapacity.

II. The Lower Courts Flout the Guarantee of Competent Counsel

This Court's recent jurisprudence has recognized the vital importance of competent counsel in state and federal post-conviction proceedings. It has also recently articulated the standard for substituting counsel in federal habeas corpus proceedings. The courts below made decisions at the intersection of these two lines of authority and deprived both of their meaning.

Four recent cases have addressed the relationship between post-conviction counsel's professional conduct and the availability of relief in federal court.[12] *See Holland v. Florida*, 560 U.S. 631 (2010); *Maples v. Thomas*, 132 S.Ct. 912 (2012); *Trevino v. Thaler*, 133 S.Ct. 1911 (2013); *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). This case illustrates the critical importance of competent, independent counsel to ensure the availability of relief in federal court. Where an attorney's competence may give rise to an avenue for federal review, a conflict arises: the attorney faces the Hobson's choice of either arguing that the attorney's own representation at an earlier state of litigation was ineffective or not making such an argument and depriving the client of federal review.

In *Holland v. Florida*, the Court addressed "whether the AEDPA's statutory limitations period may be tolled for equitable reasons." 560 U.S. at 645. The case arose because the statute of limitations was missed by a death sentenced inmate who had sought a writ of habeas corpus.

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[12] In the courts below, the State has argued that abandonment and misconduct are the equivalent to a claim of ineffectiveness of counsel as described in *Strickland v. Washington*, 466 U.S. 668 (1984) and, as such, is not available for tolling based on section 2254(i) of Title 28. *See, e.g.*, App. 435a. This argument was squarely considered and rejected in *Clair*: "2254(i) prohibits a court from granting substantive habeas relief on the basis of a lawyer's ineffectiveness in post-conviction proceedings, not from substituting counsel on that ground." 132 S.Ct. at 1287 n.3.

Id. There, an attorney's "professional misconduct could amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651. The case was remanded to the Court of Appeals "to determine whether the facts in [the] record entitle Holland to equitable tolling or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail." *Id.* at 654. Ultimately, equitable tolling would apply if the defendant had been diligent and if there were extraordinary circumstances, including egregious professional misconduct by appointed counsel. *Id.* This Court was clear: the professional conduct of Mr. Holland's federal counsel could provide an equitable basis for tolling the missed statute of limitations.

Maples v. Thomas addressed whether state post-conviction counsel's abandonment of their client could provide cause to excuse a procedural default that would have otherwise prevented review. 132 S.Ct. at 916-17. There, Mr. Maple's lawyers failed to file an appeal that was required to exhaust available state remedies. *Id.* His lawyers left their law firm without withdrawing from the case and without informing their client or the court of their departure. *Id.* Having received no notice of their departure, Mr. Maples believed he was being represented when the time for the appeal lapsed. *Id.* For Mr. Maples, the abandonment by his lawyers constituted "cause" to excuse the relevant procedural default. *Id.* Thus, counsel's performance is relevant to the availability of federal review where claims have been procedurally defaulted because of abandonment of state post-conviction counsel.

In *Martinez v. Ryan*, the Court addressed whether the ineffectiveness of his state post-conviction counsel could serve as cause to excuse his default of a claim of ineffective assistance of his trial counsel. 132 S.Ct. at 1313. The Court held that where state post-conviction provided the first opportunity to present such a claim, the ineffectiveness state post-conviction counsel in

failing to bring a claim of trial counsel's ineffectiveness could provide cause for excusing a procedural default of the claim. *Id.* at 1320. In *Trevino v. Thaler*, the Court held that *Martinez* extended to state post-conviction regimes that do not limit ineffective assistance of counsel claims to post-conviction, but make it "virtually impossible" to raise them on direct review. 133 S.Ct. 1911, 1918 (2013). Both cases make post-conviction counsel's performance relevant to the availability of federal review.

To obtain relief under any one of these four cases, an attorney may be required to investigate and present evidence of post-conviction counsel's failings. Where the attorney investigating and presenting the unprofessional acts is the same attorney who committed them, there is a conflict. The conflict may cut off federal review that would have otherwise been available.

For this reason, the federal courts that have squarely considered the issue recognize the conflict and appoint substitute, conflict-free counsel. The courts that have addressed the situation analogous to the one here have held that substitution is required. To date, this has been in cases where a *Martinez*-based claim may, as a procedural matter, be properly presented. In such cases, the federal courts are in agreement: independent counsel must be appointed to investigate the claim. *See Gray v. Person*, 526 F.App'x 331, 334 (4th Cir. 2013) ("We find that a clear conflict of interest exists in requiring Gray's counsel to identify and investigate potential errors that they themselves may have made"); *Juniper v. Davis*, 737 F.3d 288, 290 (4th Cir. 2013) ("[A]s in *Gray*, we find it ethically untenable to require [federal habeas] counsel to assert claims of his or her own ineffectiveness in the state habeas proceedings in order to adequately present defaulted ineffective-assistance-of-trial-counsel claims under *Martinez* in the federal habeas proceedings."); *see also Tabler v. Stephens*, __ F.App'x __ 2014 WL 4954294 (5th Cir.

Oct. 3, 2014) (appointment not required where what is "really at issue is whether [petitioner] was competent to waive his postconviction rights."). Substitution of independent counsel is required "because a clear conflict of interest exists in requiring petitioner' counsel to identify and investigate potential errors that they themselves may have made in failing to uncover ineffectiveness of trial counsel while they represented petitioner in his state post-conviction hearings." *Fowler v. Joyner*, 753 F.3d 446, 462 (4th Cir. 2014).

Moreover, there is a substantial likelihood that if Mr. Christeson receives conflict-free counsel, he will be able to access equitable tolling, which would provide merits review of a petition for a writ of habeas corpus. Butts and Horwitz filed his petition 117 days out of time and then actively concealed their conflict from him over the course of years. Moreover, Mr. Christeson suffers from profound cognitive impairments and, because of the nature of his case and conditions of confinement, he has been unable to seek the assistance of the inmates around him.[13] However, equitable tolling has never been meaningfully explored because conflicted counsel represent Mr. Christeson. *See Martinez*, 132 S.Ct. at 1317 (proving an attorney's misconduct "often require[s] investigative work."). The decisions below failing to substitute counsel due to a clear conflict undermine the protections this Court has provided federal habeas

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[13] After the Supreme Court's decision in *Holland v. Florida*, 560 U.S. 631 (2010), at least four federal circuits have held that a petitioner's inability to understand and protect his own legal interests can warrant tolling of the statute of limitations that Butts and Horwitz missed. *See Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th 2014) (Easterbrook, J.); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). At least two others had held the same before *Holland* was decided. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009). These holdings are in keeping with the more general rule that federal statutes of limitations may be tolled by the mental incompetence of a person who would otherwise be barred by them. *See Barrett v. Principi*, 363 F.3d 1316, 1319-20 (Fed. Cir. 2004) (collecting cases). This case is even more compelling where Mr. Christeson, because of his impairments, was preyed upon and defrauded by the very lawyers appointed to represent him.

petitioners, are at odds with the decisions of other federal courts, and should be reviewed. For those reasons also, the Court should grant review of the case.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 27th day of October, 2014:

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SUPREME COURT, U.S.

Nos. 14-6873
14A445

IN THE SUPREME COURT OF THE UNITED STATES

Mark A. Christeson,

Petitioner,

v.

Donald Roper,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

Suggestions in Opposition to Petition for Writ of Certiorari and to

Application for Stay of Execution

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IN THE SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 14-6873
	)	~~14A445~~
	)	
DONALD ROPER, WARDEN,	)	
	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO APPLICATION FOR STAY OF EXECUTION

Christeson does not present a question worthy of the Court's discretionary review under the standard that informs the Court's exercise of jurisdiction, Supreme Court Rule 10; thus, the Court should deny the petition for writ of certiorari. Similarly, because there is not a reasonable probability that four members of the Court would consider the case worthy of review and a significant likelihood of reversal of the lower court, the Court should deny the motion for stay of execution. *Barefoot v. Estelle,* 463 U.S 880, 895 (1983).

Procedural History

The district court granted Christeson's motion to appoint counsel on July 2, 2004 (04-8004 Doc.5). Original counsel filed the petition for writ of habeas corpus on August 5, 2005 (Doc.10). After a response (Doc.27), a

traverse (Doc.39), and supplemental pleading (Docs.45, 48), the district court denied the petition on the threshold question of timeliness (Docs.52, 53) as well as the following Rule 59(e) motion (Docs.54, 55, 56). Christeson appealed (Doc.57), and the court of appeals denied a certificate of appealability (Doc.61; Court of Appeals No. 07-1905).

Seven years later, secondary counsel filed a "Notice by Friends of the Court of Petitioner's Need for Substitution by Conflict-Free Counsel" (Doc.62), that the Clerk renamed a "Motion" (Docket entry 62). Fed.R.Civ.P. 7(b). After briefing by original counsel (Doc.73), respondent (Doc.76) and secondary counsel (Doc.77), the district court denied the request for appointment of substitute counsel (Doc.78). A notice of appeal was filed by secondary counsel (Doc.83), and the court of appeals dismissed the appeal on October 15, 2014, due to secondary counsel's lack of standing. While the appeal was pending, the district court denied a second motion to substitute due to the court's lack of jurisdiction (Doc.86). The court also denied a third motion to substitute due to the court's lack of jurisdiction or the motion's lack of merit (Doc.92). On October 21, 2014, the court of appeals granted permission to file a fourth motion. Secondary counsel filed a fourth motion (Doc.100). After the suggestions in opposition (Doc.101), the district court denied the motion (Doc.102). On October 24, 2014, the court of appeals

summarily affirmed the district court and denied a stay of execution (No. 14-3389).

Original counsel has also filed a motion for stay of execution in *Zink v. Lombardi*, No. 14-2220 (8th Cir. Oct. 21, 2014). The court of appeals denied the motion in a divided en banc decision on October 24, 2014.

Statement of the Case

Giving rise to the habeas litigation is Christeson's conviction in the Vernon County (Missouri) Circuit Court. Christeson raped Susan Brouk. Afterwards, Christeson and co-defendant Jesse Carter forced Brouk and her children into Brouk's car and drove them to a nearby pond. They forced Brouk to the bank of the pond. Christeson kicked Brouk below her ribs, and she collapsed. With his foot on her mid-section, Christeson cut Brouk's throat. She bled, but did not die immediately. She told Adrian and Kyle, her children, that she loved them. Christeson cut Kyle's throat twice. He then held Kyle under the pond water until Kyle died. Christeson then pressed down on the throat of Adrian until she suffocated. Carter pushed her body into the pond too. While Brouk was still alive, but barely breathing, Christeson and Carter threw her into the pond on top of her children's bodies.

The State charged Christeson with three counts of first-degree murder, and the jury found him guilty and returned death sentences. The Missouri Supreme Court affirmed the convictions and sentences, *State v. Christeson*,

50 S.W.3d 251, 257-60 (Mo. banc 2001) (full statement of facts), as well as the denial of post-conviction relief, *Christeson v. State*, 131 S.W.3d 796 (Mo. banc 2004).

Reasons to Deny the Writ

I. The district court reasonably denied the motion to substitute counsel.

The district court properly exercised its discretion in denying the fourth motion to substitute counsel. In deciding a motion to substitute counsel, this Court held that a court should look to the "interest of justice." *Martel v. Clair*, 132 S.Ct. 1276, 1284-87 (2012). It is a context-specific, case-by-case test. *Id.* at 1287. One factor to consider is the reason for the substitution. Another factor is the timeliness of the request. *Id.* at 1286-7, *citing inter alia Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995). Finally, in *Martel*, the Court found that no new attorney was needed because further motions in the district court were futile. *Id.* at 1289. A lower court's ruling on a motion to substitute is reviewed on appeal for abuse of discretion. *Id.* at 1287. Christeson did not show a significant possibility that the district court abused its discretion when it denied the motion to substitute; thus, the court of appeals summarily affirmed the district court's order (No. 14-3389).

The district court correctly articulated the legal standard for determining whether to allow substitution of counsel (Doc.102, p. 1, *citing*

Lambrix v. Sec'y, Florida Dep't of Corr., 756 F.3d 1246, 1259 (11th Cir. 2014) and *Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012)). Christeson presents no argument that the courts below used the wrong legal standard.

A. There was no legitimate reason for substitution of counsel.

Christeson contends that the district court abused its discretion when it denied the fourth Motion to Substitute counsel. The essence of secondary counsel's claim is that the federal court should allow Christeson to litigate in a Rule 60(b) motion an allegation that there should have been equitable tolling before the August 5, 2005 filing of the original habeas petition because he received ineffective assistance of habeas counsel (Doc.62, pp. 22-31, Doc.100, p.13). Christeson continues by suggesting that original counsel cannot assert equitable tolling due to a conflict of interest; thus, there is reason to substitute counsel. The district court properly rejected the contention (Doc.102, p. 2). This contention fails for many reasons.

First, a claim of ineffective assistance of habeas counsel is not a ground for relief. 28 U.S.C. § 2254(i). As in *Martel*, the district court did not abuse its discretion when it declined to substitute counsel because there is no legitimate reason for substitution. *Martel*, 132 S.Ct. at 1286-7.

Second, this Court acknowledged "equitable tolling" in 2010 as a means of redeeming a petition that violated the statute of limitations. 28 U.S.C. § 2244(d); *see Holland v. Florida*, 560 U.S. 631 (2010). Equitable tolling was

available to a habeas petitioner within the circuit well before 2010. *See Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000). Under *Kreutzer*, the offender must show an extraordinary circumstance beyond his control made it impossible for him to file a petition on time. *Id.* at 463. Now under *Holland*, the offender must show more. He must show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented his timely filing. 560 U.S. at 649, *citing Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Under both *Holland* and *Kreutzer*, simple attorney confusion about the due date of the petition is insufficient to warrant equitable tolling. "Further, counsel's failure to recognize the importance of the one-year statute of limitations in § 2244(d)(1) does not necessarily invoke the equitable tolling doctrine. We agree with those courts that have found that counsel's confusion about the applicable statute of limitations does not warrant equitable tolling." *Kreutzer v. Bowersox*, 231 F.3d at 463. The *Holland* Court reinforced this approach. "We have previously held that "a garden variety claim of excusable neglect"... such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline...does not warrant equitable tolling." *Holland*, 560 U.S. at 651-2; *see Lugo v. Sec'y*, 750 F.3d 1198, 1209 (11th Cir. 2014) (rejecting attorney negligence or misconduct as basis for equitable tolling).

The court of appeals applied *Kreutzer* and *Holland* as well as *Lawrence v. Florida*, 549 U.S. 327 (2007) in *Rues v. Denney*, 643 F.3d 618 (8th Cir. 2011), and determined that alleged attorney error in the calculation of the due date was not an extraordinary circumstance that could be a foundation for equitable tolling.

> The district court cited *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) in support of the proposition that an attorney's miscalculation of a filing deadline is not an extraordinary circumstance permitting equitable tolling. The Supreme Court has since reaffirmed this principle on two occasions. *See Lawrence v. Florida*, 549 U.S. 327, 336–37, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel."); *see also Holland*, 130 S.Ct. at 2564 ("We have previously held that a garden variety claim of excusable neglect, ... such as a simple miscalculation that leads a lawyer to miss a filling deadline, ... does not warrant equitable tolling ... [absent additional facts of] far more serious instances of attorney misconduct." (internal citations and quotation marks omitted)). We find Rues' counsel's miscalculation of his filing deadline is a "garden variety claim" of neglect and does not warrant equitable tolling. Thus, as Rues filed his petition on May 20, 2009, he clearly missed the May 6, 2009 filing deadline established by § 2244(d)(1)(A).

Id. at 621-2. Similarly, Christeson could not assert attorney error or "ineffective assistance of habeas counsel" as a basis for equitable tolling in either the earlier habeas proceeding or today; thus, Christeson's contention

that original counsel suffers from a conflict of interest is erroneous. Indeed, to the contrary of Christeson's assertion, it was reasonable for original counsel not to assert equitable tolling, given the substantial obstacles it faced, then and now. As in *Martel*, the district court did not abuse its discretion when it declined to substitute counsel because there is no legitimate reason for substitution. *Martel*, 132 S.Ct. at 1286-7.

Third, even if "ineffective assistance" of habeas counsel could warrant equitable tolling, which it does not, original counsel was not "ineffective" under *Strickland v. Washington*, 466 U.S. 668 (1984). Original habeas counsel deliberately chose August 5, 2005, as the date for filing the federal habeas petition (Doc.39, pp. 8-11; Doc.45, p. 4; Doc.51; Doc.54; Doc.73, pp. 5-8; Doc.75, p. 3; Doc.76, pp. 2-4). Original counsel's reading of 28 U.S.C. §2244(d)(1), along with the cases construing this statute, gave them a reasoned basis for choosing the date to file the petition (Doc.39, *citing Carey v. Saffold*, 563 U.S. 214 (2002); *Clay v. United States*, 537 U.S. 522 (2003); *Duncan v. Walker*, 533 U.S. 167 (2001); *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) and Doc.54 *citing Carey v. Saffold, supra; Curtiss v. Mount Pleasant Correctional Facility*, 338 F.3d 851 (8th Cir. 2003); *Williams v. Bruton*, 299 F.3d 981 (8th Cir. 2002)). Counsel's theory allowed Christeson the full benefit of the one-year period and a timely filing of the petition. While the theory was ultimately wrong, that judicial determination does not

retroactively make original counsel's behavior unreasonable. Such conscious decision-making by counsel was reasonable, as articulated by counsel. And as such, it is not a basis for a finding of ineffective assistance. *See id.* at 690-91; *Coleman v. Thompson*, 501 U.S. 722 (1991). As in *Martel*, the district court did not abuse its discretion when it declined to substitute counsel because there is no legitimate reason for substitution. *Martel*, 132 S.Ct. at 1286-7.

Fourth, the premise of Christeson's contention is wrong. Christeson contends that original counsel suffered from a conflict of interest because original counsel cannot assert their "ineffectiveness" as a basis for equitable tolling. Generally, in the Eighth Circuit, "original counsels" can and do assert equitable tolling while representing their clients. *See Kreutzer v. Bowersox*, 231 F.3d at 463; *Barnett v. Roper* 2008 WL 699095, at * 17-19 (8th Cir.) (Barnett's Reply Brief). Moreover, a claim that original counsel suffered from a conflict of interest does not warrant substitution of counsel. *See Lambrix v. Sec'y*, 756 F.3d 1246, 1256-7 (11th Cir. 2014). As in *Martel*, the district court did not abuse its discretion when it declined to substitute counsel because there is no legitimate reason for substitution. *Martel*, 132 S.Ct. at 1286-7.

Christeson seeks to avoid these precedents by relabeling his contention as "abandonment" (Petition, p. 11). As noted in the Procedural History,

original counsel litigated at every opportunity the timeliness of the 2005 petition before the district court and the court of appeals. Vigorous litigation is not abandonment. Christeson, through original counsel, also joined the various "lethal injection" suits from 2007 through today. Those actions by original counsel are not abandonment. Secondary counsel complains about original counsel's informing the district court of the truth of their representation of Christeson (Petition, p. 9). But the reasoning of counsel was readily ascertainable from the 2005-07 filings by counsel (Suggestions, *supra* at p. 9). Second, the district court had directed Christeson to discuss the May 23, 2014 motion (Doc.63).

B. The motion to substitute was untimely.

The second *Martel* factor is the timeliness of the motion to substitute. 132 S.Ct. at 1286-7. The 2014 "Notice by Friends" was filed seven years after court of appeals dismissed Christeson's appeal in 2007 (Doc.62). It was not timely filed, and that would have been a sufficient basis to deny the motion. The lack of timeliness would also be a reasonable basis to deny any future request for Rule 60(b) relief. Fed.R.Civ.P. 60(c). The second and third motions to substitute were pending during periods when the Court did not even have jurisdiction (Doc.86, 97). In the fourth motion Christeson suggests that he was unaware that his habeas litigation was over seven years ago (Doc.100 p. 12; Petition, pp. 13-17). The record disproved this suggestion. Secondary

counsel had informed original counsel that Christeson was informed many years ago that his federal habeas petition had been dismissed, and Christeson was aware of ongoing proceedings in his case (Doc.73, p. 5)[1]. Christeson's awareness was understandable because of efforts by original counsel to keep Christeson informed of the status of his habeas litigation (Doc.73, pp. 10-12), including a meeting with Christeson in June 2007, shortly after the Court's dismissal of the original appeal (Doc.73, p. 12). Given Christeson's awareness of the original habeas litigation, he did not file a motion to substitute counsel timely.[2] The district court did not abuse its discretion in finding the motion was untimely (Doc.102, pp. 1-2) and an abuse of the habeas process (Doc.102, p. 2)

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[1] Original counsel made multiple appropriate filings in Christeson's direct appeal, filings in opposition to the State's efforts to obtain an execution date (Doc.76-1). Separately, Christeson intervened as a plaintiff and was represented by Mr. Butts in *Clemons v. Crawford*, No. 2:07-CV-4129-FJG (W.D.Mo.) (Doc.76-2). Christeson joined over a dozen other Missouri death row inmates who unsuccessfully challenged the implementation of the Missouri protocol. *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009). Christeson was also an intervening plaintiff and represented by Mr. Butts in *Ringo v. Lombardi*, No. 2:09-CV-4095-NKL (W.D.Mo.) (Doc.76-3). The Court eventually dismissed that litigation as moot. *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012). Christeson, represented by Mr. Butts, was and continues as a plaintiff in the *Zink* litigation. No. 2:12-CV-4209-BP (W.D.Mo.) (Doc.76-4) Christeson was also a plaintiff in *Middleton v. Mo. Dep't of Corrections* (Doc.76-5). These actions by original counsel after the federal habeas litigation concluded were ongoing and reasonable.

[2] The untimely nature of the fourth motion is also highlighted by the record. Secondary counsel waited thirty-two days after the first order before filing a notice of appeal (Doc.83). Christeson recognizes the untimely nature of the motion when he requests a stay-of-execution (Doc.100, p. 13).

C. Further litigation would be futile.

The final *Martel* factor is whether further litigation would be futile with new attorneys. *Martel*, 132 S.Ct. at 1289. The answer to that question is yes. The sole theory given to the district court was that new attorneys could attempt a Rule 60(b) motion asserting equitable tolling to overcome the untimeliness of the federal petition (Doc. 62, p. 22-31, Doc.100, p. 13). As noted earlier, that assertion is meritless for multiple reasons. Christeson suggests he would litigate an ineffective-assistance-of-trial-counsel claim in federal court (Petition, pp. 17-19). Of course, Judge Ronnie White, writing for the Missouri Supreme Court, found the ineffectiveness claim did not warrant post-conviction relief in state court, *Chirsteson v. State*, 131 S.W.3d at 799, a determination entitled to deference under 28 U.S.C. § 2254(d). As in *Martel*, the district court did not abuse its discretion when it declined to substitute counsel because there is no legitimate reason for substitution. *Martel*, 132 S.Ct. at 1286-7.

D. "New evidence" does not warrant substitution.

The fourth motion to substitute asserted there is new evidence (Doc.100, pp. 10-12). Christeson did not explain how the putative new evidence, alleged injuries from a 2000 assault of Christeson, should have affected the district court's consideration of any of the three *Martel* factors. Even if Christeson showed that he has difficulty remembering attorney

names, dislikes watching Jeopardy and the like (Doc.100 citing Motion to Remand; Motion to Remand pp. 6-8, Petition, p. 13), those facts do not render the untimely federal habeas petition timely. Perhaps the implicit argument is that there should have been equitable tolling due to Christeson's mental state in 2004-05. The argument fails legally and factually.

Legally, Christeson was represented by counsel in 2004-5, when he filed his untimely habeas petition. Christeson does not actually assert that his mental state affected the filing of the habeas petition on August 5, 2005. As noted earlier, the filing occurred as a reasoned decision by original counsel. Christeson cited to four cases for a proposition that mental impairments may justify equitable tolling to redeem an untimely petition (Petition, p. 33 n. 13). But those cases, *Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th Cir. 2014); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010), involved an untimely filing by a pro se offender, not one who is counseled. *See Ryan v. Gonzales*, 133 S.Ct. 696, 703 n. 6 (2013) (distinguishing cases where petitioner is represented by counsel from those where he is not). Legally, Christeson's contention is meritless.

Factually, Christeson's contention is insufficient. Christeson was competent for trial. At the penalty phase, Christeson's expert, Dr. Draper, did not testify about any mental disease or defect she observed in him (Tr.

1659). Christeson filed a timely post-conviction relief motion under Rule 29.15. *See Christeson v. State*, 131 S.W.3d 796, 798 (Mo. banc 2004). At the post-conviction proceeding, the evidence Christeson presented showed no mental impairment (Doc.101-1, pp. 140-7). While he alleged that he suffered from congenital brain damage, he offered no evidence to support the contention at the Rule 29.15 hearing. (Doc.101-1, p. 160).

Further, the Petition relates anecdotes from Missouri inmates (Petition, pp. 13-17). But those stories by Burgdorf, French, and Harrison do not demonstrate a mental disease or defect that rises to a level of incompetency that could conceivably support equitable tolling. *See Burgdorf v. State*, 298 S.W.3d 578 (Mo. App. S.D. 2009) (upholding second-degree murder conviction); *State v. Harrison*, 220 S.W.3d 827 (Mo. App. W.D. 2007) (upholding convictions for six sex offenses). Lastly, even if the allegations by these inmates about Christeson were true in 2014, the relevant inquiry is not 2014, but 2005, the year the statute of limitations expired. Burgdorf, French, and Harrison offer no information about Christeson's mental status at the relevant time.

Lastly, Christeson complained about the "predatory environment" at the Potosi Correctional Center (Petition, pp. 16-17, Doc.100, pp. 11-12). The allegation is legally and factually meritless. Legally, if the allegation were true, it does not compel substitution of secondary counsel. Christeson does

not suggest what effect the truth of the allegation would have on the substitution of counsel or equitable tolling.

Factually, Christeson's exposure to a "predatory environment" began earlier than his admission to the Potosi Correctional Center when Christeson, as the predator, sexually molested a youth (Doc.101-1, pp. 141-2). Additionally, at the penalty phase of trial, the jury learned about Christeson's rape of his cellmate Mike Wagner. Wagner testified that in February and March of 1999, he shared a cell with Christeson, and about four days before Mr. Wagner's release from jail, Christeson passed him a note that said Christeson would have someone wait outside of the 3M plant where Mr. Wagner's father worked if Mr. Wagner did not do what Christeson said (Tr. 1547-49). Christeson hung blankets from the bunk above his so that no one could see into his bed (Tr. 1550). Christeson told Mr. Wagner to come onto his bed and play cards with him, and then Christeson forced Mr. Wagner to perform oral sex on him (Tr. 1549, 1551). On two other occasions, Christeson sodomized Mr. Wagner by putting his penis into Mr. Wagner's anus (Tr. 1552). Mr. Wagner only complied because he feared for his father's safety (Tr. 1552, 1554).

Mr. Wagner was released from jail, but did not immediately tell anyone about the sodomy because he was afraid for his father (Tr. 1554). Mr. Wagner eventually told his mother, who had noticed blood in his underwear

ever since he came back from jail and had seen his rectum bleeding two days after his release, and she took him to Dr. John Loney, who found a tear in Mr. Wagner's rectum (Tr. 1554, 1564-65, 1567, 1585). Cellmate Robert Milner also testified that on two nights, he woke up hearing voices coming from Christeson's bunk saw something bumping the blankets, and saw Christeson and Mr. Wagner were in Christeson's bed (Tr. 1572-74). Christeson's complaint about the "predatory nature" of confinement rings hollow in light of the record. Additionally since Christeson's arrival at the Potosi Correctional Center, his involvement in creating a predatory environment continues as evidence by the multiple conduct violations he has received (Doc.101-2).

E. Christeson presents no question worthy of discretionary review.

Christeson does not identify a significant federal question that has not but that should be answered by this Court. Supreme Court Rule 10(c). Christeson also does not demonstrate a conflict among lower courts on the question of whether substitution counsel must be appointed to examine the action of original habeas counsel. In *Lambrix v. Sec'y, Florida Dep't of Corr.*, 756 F.3d at 1246, the offender sought new habeas counsel to file a second petition alleging first habeas counsel should have litigated in the first habeas petition claims defaulted by first habeas counsel in state court. *Id.* at 1257.

Concluding that presenting the new ineffectiveness claims would be futile, the court affirmed the denial of relief. *Id.* at 1260-61. Similarly, Christeson does not demonstrate a basis for equitable tolling; thus, any renewed litigation would be futile. The district court properly denied the fourth motion to substitute.

Conclusion

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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*/s/*Stephen D. Hawke

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RECORD
AND
BRIEFS

FILED
OCT 28 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 14-6873
	)	14A445
	)	
DONALD ROPER, WARDEN,	)	
	)	
Respondent.	)	

SUPPLEMENTAL RESPONSE

In response to the Justice Alito's order, counsel for Respondent has reviewed the Appendix submitted by Christeson, and the record does not show that Christeson has authorized Merrigan, Mills or Perkovich to move for substitution of counsel. This lack of authorization was the basis of the court of appeals' October 15, 2014 dismissal of the district court's first denial of the motion to substitute (App. 240a). Before that dismissal, the court had ordered the parties to address Merrigan and Perkovich's standing to proceed (App. 184a). In response to the order to secondary counsel, Merrigan and Perkovich asserted they had a retention agreement "limited to the present appeal only." (App. 186a). The "present appeal" was that in No. 14-2896 (App. 189a). Respondent pointed out that secondary counsel had not placed the alleged retention letter into evidence before the court (App. 199a). Secondary counsel did not address this omission in the Reply (App. 206a-210a). The

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court of appeals dismissed the appeal because Merrigan and Perkovich did not have standing to proceed (App. 240a).

The district court dismissed the second and third motions to substitute counsel because it did not have jurisdiction due to Christeson's appeal (BIO, p. 3). But in denying the third motion to substitute, the district court also ruled in the alternative that it was denying the motion "for the reason previously stated by the Eighth Circuit, this [district] Court, by Petitioner's counsel, and by Respondent" (App. 300a). This reason included the Eighth Circuit's conclusion that secondary counsel lacked standing to proceed (App. 240a).

During the litigation of the fourth motion to substitute, secondary counsel did not cure their lack of standing to proceed. Secondary counsel did not place any retention letter into the record before the courts below (App. 340a-447a). The record does not show that Christeson has authorized Merrigan, Mills, or Perkovich to move on his behalf for substitution of counsel appointed pursuant to 18 U.S.C. § 3599.

Respectfully submitted,

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
DEATH PENALTY CASE
EXECUTION SCHEDULED: 12:01 A.M., CDT, OCTOBER 29, 2014

MARK A. CHRISTESON, Petitioner,	:	Nos. 14-6873
	:	14A445
DONALD ROPER, WARDEN, Respondent	:	

PETITIONER'S REPLY TO COMBINED OPPOSITION TO STAY APPLICATION AND PETITION FOR A WRIT OF CERTIORARI

Respondent's Opposition[1] rehearses the procedural history in the Western District of Missouri and Eighth Circuit since the May 23, 2014 Notice By Friends Of The Court Of Petitioner's Need For Substitution By Conflict-Free Counsel (App. 1a), reflecting the lower courts' woeful handling of the repeated (ultimately, four) requests under 18 U.S.C. §3599 for substitution by conflict-free counsel to replace the conflicted, appointed attorneys who have, in various turns, abandoned, deceived, ignored, and opposed Mr. Christeson. Opp. at 3. Mr. Christeson was only able to escape that morass yesterday, having finally obtained a judgment from the Eighth Circuit to bring to this Court.

The Opposition acknowledges the controlling authority on Mr. Christeson's matter before this Court but fails to address the conflict of interest itself and the consequences that should follow from application of *Martel v. Clair*. The proper effect of *Martel* is side-stepped in service of the aim to sustain the Eighth Circuit's endorsement of appointed counsel's abandonment of Mr. Christeson, a man with profound impairments, at the single most critical juncture in their appointment.

---

[1] Suggestions in Opposition to Petition for Writ of Certiorari and to Application for Stay of Execution, filed October 27, 2014.

ARGUMENT

Respondent and Petitioner agree that *Martel v. Clair*, 132 S.Ct. 1276, 1284 (2012), controls the substitution motion *sub judice*. Opp. at 5-6. Respondent correctly points to *Martel*'s "interests of justice" standard and addresses certain of the criteria, which has also been addressed elsewhere. Opp. at 5. But the Opposition merely grazes the heart of this dispute, *viz.*, Butts and Horwitz's conflict against Mr. Christeson due to the complete breakdown of their fiduciary duties to him at the most critical juncture.

A. The Courts Below Avoided Appointed Counsel's Conflict of Interest

Mr. Christeson's case is about whether the conflict of interest that his appointed counsel have against him requires substitution by conflict-free counsel. *See* Oct. 27, 2014, Pet., at i (Questions Presented, Question 1). The existence of this actual conflict is plain; indeed, District Judge Whipple's October 22, 2014 order *sub judice* (App. 375a), completely side-steps any engagement with the point. Pet. at 3. As litigated in the proceedings in the lower courts and argued here (Pet. at 25-27), the tenets of, *inter alia*, agency law, the law of professional conduct, and law governing lawyers all point emphatically in one direction. When counsel miss a crucial deadline, a "significant conflict of interest" arises between the client and his attorneys because the "strongest argument" for overcoming the default becomes the fact that counsel had abandoned him. *Maples v. Thomas*, 132 S.Ct. 912, 925 n.8 (2012), cited in Pet. at 25. Despite the pivotal function of this conflict, the district court's denial of Mr. Christeson's substitution (and the court of appeal's summary affirmance of that denial) flatly avoid addressing it. *See*

Brief of Former Federal and State Judges as *Amici Curiae* in Support of Petitioner, at 5, *Christeson v. Roper*, Case No. 14-6873.

B. Counsel's Abandonment When The Filing Deadline Passed Is Decisive

As the procedural history covered in the Opposition reflects, there has been extensive briefing on these issues. Opp. at 3-4. The Opposition repeatedly discusses "ineffective assistance" as an aspect of Mr. Christeson's argument. Opp. at 8. This is perplexing because that idea has played no part in the abandonment and misconduct points lying at the heart of this litigation. Respondent's repeated invocation of the term, in quotations, is simply misleading, given that Petitioner has not discussed ineffectiveness in relation to equitable tolling or, for that matter, the conflict of interest analysis. *Id.* at 8-9.

Petitioner does not argue that federal habeas counsel were ineffective under their 18 U.S.C. §3599 appointment. Opp. at 6. Ineffective §2254 counsel is a straw man and a figment of only Respondent's imagination. Since the inception of these proceedings on May 23, 2014, the position for Mr. Christeson has been that appointed counsel abandoned him when his federal habeas petition was due and that the abandonment had an unmistakable "causal connection" with the failure to file timely. *See , e.g., Gillman v. Sec'y, Florida Dept. of Corr.*, 576 Fed.Appx. 940, 943 (11th Cir. 2014), quoting in *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011). Respondent either misreads or ignores this Court's recent jurisprudence (*e.g., Maples; Holland*), clearly providing that abandonment and egregious misconduct may readily supply grounds for overcoming procedural default. At this late date in Mr. Christeson's litigation, it is beyond perplexing

that Respondent would suggest Petitioner is arguing that Butts and Horwitz were simply ineffective.

As submitted to this Court yesterday, there is room for only one reading of Butts and Horwitz's conduct in the timeframe relevant for this Court's equitable tolling analysis under *Holland*, 560 U.S. at 649—*i.e.*, the period leading up to the filing deadline for the federal habeas petition.

By now, it is undisputed by all involved—save, perhaps Butts and Horwitz (App. 13a)—that the petition for Mr. Christeson was due by April 5, 2005. Yet after District Judge Whipple appointed Butts and Horwitz on July 2, 2004, contingent, *inter alia*, upon their submission of a budget that they filed on July 28, 2004, the docket reflects no activity by the parties until Butts and Horwitz filed the petition on August 5, 2005, 117 days out of time. App. 451a. As the record *sub judice* has developed throughout the lower court proceedings this year, it has emerged that Butts and Horwitz did not first meet Mr. Christeson until May 27, 2005, six weeks *after* the April 5, 2005 deadline. Pet. at 12; App. 93a. Further, appointed counsel have not identified *any* correspondence to Mr. Christeson prior to August 15, 2005 – ten days after the filing of their untimely petition – despite appearing to have identified every letter they have sent him during their appointment. App. 94a.

C. Counsel Manifested Their Conflict Through Vigorous Self-Defense At Petitioner's Grave Expense

In the present proceedings, Butts and Horwitz have launched a vigorous defense of their actions since the filing of the late petition on August 5, 2005. App. 86a *et seq.* Yet the record reflecting the time relevant for *Holland* supports only one reading:

appointed counsel had abandoned Mr. Christeson leading up to, and on the date of, his filing deadline.

Respondent argues that under Eighth Circuit authorities, equitable tolling was available to Petitioner when his appointed counsel procedurally defaulted his case in 2005, even before this Court's ruling in *Holland*. Opp. at 6-7, citing *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000). Petitioner agrees that equitable tolling of §2244(d)(1) was recognized in the Eighth Circuit at the time Butts and Horwitz defaulted Mr. Christeson's habeas petition and then litigated its untimeliness pursuant to the district court's briefing schedule through to the order dismissing the action on January 31, 2007. Two vital points must be made in reply.

1. Counsel's Self-Serving Advocacy Further Demonstrates Their Conflict

First, Butts and Horwitz had *every opportunity to raise equitable tolling* during that long span of briefing (and extensions) following their untimely filed petition. At the point that they resumed their representation of Mr. Christeson and then filed his petition, they had already become irredeemably conflicted by virtue of the violation of fundamental canons of professional responsibility inherent in their abandonment and resulting lapsed statute of limitations. *Holland*, 560 U.S. at 652-53. Respondent now seeks to perpetuate Mr. Christeson's burden from that conflict by insisting that his conflicted counsel's choice to litigate in their self-interest rather than his legal interest in 2005 and 2006 now forecloses conflict-free counsel from ever raising the issue upon belated replacement of the conflicted appointed attorneys, Butts and Horwitz.

In *Kreutzer*, 231 F.3d at 463, the attorneys responsible for missing filing deadlines raised equitable tolling as grounds for overcoming the procedural default of

their making. Opp. at 10. Other courts too have recognized that an attorney *may* raise the existence of grounds for equitable tolling. But the conflicted lawyer may go no further than implicating their own conduct and its legal significance because, *inter alia*, the attorney becomes a witness as to the relevant facts and he would labor under an actual conflict. *See Sallie v. Humphrey*, 789 F.Supp.2d 1351, 1364 (M.D. Ga. 2011) (district court ordered replacement of counsel after attorneys responsible for running out the statute of limitations raised the existence of equitable tolling grounds, requiring new counsel to develop and litigate equitable tolling). The fact that a conflicted attorney *may* introduce grounds for equitable tolling of a statute of limitations that he missed does not mean that a petitioner burdened by appointed counsel who missed his deadline must rely on that faulty attorney to transcend the conflict of interest created by his having defaulted the petitioner's habeas case.

Respondent argues that "simple attorney confusion about the due date of the petition is insufficient to warrant equitable tolling." Opp. at 7. Indeed, that is what Respondent can see when reviewing Butts and Horwitz's pleadings in the district court from 2005 through the end of 2006 and then again in the middle of this year. The conflicted attorneys have steadfastly maintained their *post hoc* analysis of timeliness of their very untimely petition. App. 45a.

Again, the pleadings and self-serving advocacy of these conflicted attorneys does not speak to the fact of the matter concerning what Butts and Horwitz knew or did not know and did or did not do when the deadline was widely missed. The whole point is that the appointed lawyers labored under this conflict situated at the center of the equitable tolling question that determines whether Mr. Christeson may return to court for his first

federal habeas review. Butts and Horwitz are the main witnesses to the equitable tolling question. Yet they have had the role of Mr. Christeson's advocate instead, where they have laid a self-serving and dubious line of argument to the grave detriment of their client.

Undersigned counsel have sought any information from appointed counsel to shed light or clarify the factual record in the period leading up to the April 10, 2005 habeas deadline. App. 12a. Yet Butts and Horwitz (and, for that matter, the State) have supplied no information, let alone evidence, to begin to fill this hole. A dispassionate reading of the foregoing record reflects simply a void in Mr. Christeson's representation. The only conclusion available from this record is that he was utterly abandoned when it mattered. Butts and Horwitz ultimately recovered in the sense that they would be able to keep up appearances as Mr. Christeson's counsel, but their unquestioned abandonment at the critical time remains.

It is this keeping up of appearances that Butts and Horwitz, the State, and the lower courts have all focused upon in their treatment of the abandonment question. *Holland* is not ambiguous on this point; the abandonment and/or misconduct assessment concerns the filing deadline (April 10, 2005), and the period leading up to it. What lawyers end up doing long after the blown filing deadline typically has little or no bearing upon the analysis relevant to equitable tolling of the one-year statute. Yet Respondent (Opp. at 11), and District Judge Whipple have relied on Butts and Horwitz's self-serving pleading about their post-2005 communication with Mr. Christeson and the periodic adding of Mr. Christeson's name to the list in multi-party litigation concerning Missouri's death row. App. 376a. Respondent's heavy reliance on Petitioner's conflicted

appointed counsel's pleadings lodged, in counsel's self-defense, in the district court only highlights Butts and Horwitz's already unmistakable conflict. Opp. at 10-11. Respondent has underscored for this Court that Butts and Horwitz's account of their conduct in Mr. Christeson's name since having to litigate the untimeliness of their petition and thereafter, to add him to Missouri's several multi-party lethal injection litigations since 2007 settles the matter before this Court: "Vigorous litigation is not abandonment." Opp. at 11.

To this end, Respondent posits that Butts and Horwitz's late "filing occurred as a reasoned decision by original counsel." Opp. at 14. This assessment of the filing comes from the attorneys who breached their fiduciary duty to Mr. Christeson at the most critical juncture in their appointment. It should come as no surprise, but with considerable disappointment, that attorneys capable of abandonment are also capable of self-serving representations to the court that appointed them in their attempt to salvage their professional image. It is one thing to miscalculate a deadline; it is another to abandon a capital case very soon after taking it. The record from circa April 2005 reflects the latter, and only the latter, circumstance.

2. Counsel Have Acknowledged Mr. Christeson's Impairments But Left Them Unattended

Second, the record reflects Mr. Christeson did not learn until his first meeting with undersigned counsel on May 4, 2014 that his federal petition was untimely filed and subsequently dismissed (with the appeal denied) over seven years ago. App. 8a. Respondent, however, still attributes to Mr. Christeson an "awareness of the original habeas litigation" that, as a matter of fact, he simply did not possess. Opp. at 12. As addressed throughout the proceedings below, Mr. Christeson's cognitive impairments are

readily observable from routine client interviewing yet he has never obtained any—let alone a thorough—neuropsychiatric evaluation and reporting to begin to make sense of how compromised, as a medical matter, he is.

Mr. Christeson himself is not to be faulted because his attorneys—both his current appointed counsel and his state collateral review counsel—never managed to have him evaluated *even though they expressly recognized its necessity*. State post-conviction counsel pleaded trial counsel ineffectiveness due to a failure to develop and present evidence of neuropsychiatric impairments, yet that counsel never had him tested. App. 102a. Butts and Horwitz included funding for a neuropsychiatric expert in their July 28, 2004 budget (App. 451a), which the district court approved, yet they never retained an expert and Mr. Christeson was never examined in the many years leading up to the Missouri Supreme Court entering his execution warrant on September 19, 2014.

D. Mr. Christeson Has Struggled Through The Courts Below To Arrive Here

Finally, Respondent asserts that Mr. Christeson's substitution motion is somehow untimely. Opp. at 11-12. The record below, commencing on May 23, 2014, long before the Missouri Supreme Court entered on September 19, 2014 the present execution warrant, belies such a portrayal of the effort to obtain conflict-free counsel in order to litigate equitable tolling. Throughout this litigation—initiated days after attorneys other than Mr. Christeson's conflicted, appointed counsel, Butts and Horwitz, learned from Petitioner that he simply was not aware his federal habeas case had been defaulted—both Respondent and Butts and Horwitz have successfully sought filing extensions on their briefing, unduly drawing out the proceedings in the lower court.

CONCLUSION

For the further reasons set forth in this reply, this Court should grant Mr. Christeson a stay of execution and a writ of certiorari.

Respectfully submitted,
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October 28, 2014

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I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 28th day of October, 2014:

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Jennifer A. Merrigan

Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES
DEATH PENALTY CASE
EXECUTION SCHEDULED: 12:01 A.M., CDT, OCTOBER 29, 2014

MARK A. CHRISTESON, Petitioner,	:	Nos. 14-6873
	:	14A445
v.	:	
	:	
DONALD ROPER, WARDEN, Respondent	:	

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING MR. CHRISTESON'S AUTHORIZATION OF COUNSEL MS. MERRIGAN AND MR. PERKOVICH TO MOVE FOR SUBSTITUTION OF COUNSEL

1. By An August 7, 2014 Letter, Mr. Christeson Retained Merrigan and Perkovich

Mr. Christeson first retained undersigned counsel Merrigan and Perkovich by a retention agreement letter dated August 7, 2014 (Retention Agreement), counter-signed by Mr. Christeson and returned through the prison mail on August 12, 2014, and carried out pursuant to Missouri Professional Conduct Rule 4-1.2(c), which provides: "A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer's limited role." Missouri Rule 4-1.2(c).

The existence of this Retention Agreement was identified in supplemental briefing before the Eighth Circuit. Petitioner therein noted that the Retention Agreement

> is subject to attorney/client privilege and confidentiality. However, for the purposes of clarifying the present question of standing, Appellant submits that the August 7, 2014 letter specifies that undersigned counsel would represent Mr. Christeson in his appeal of the Order in question and only in that appeal, detailing this scope of appellate representation. By August 12, 2014, Mr. Christeson signed and returned to undersigned counsel the retention letter for this limited representation.

App. 190a.

2. Mr. Christeson's Representation Continued With The Renewed Substitution Motion Resulting In The Eighth Circuit Judgment Before This Court

Upon the Eighth Circuit's dismissal on October 15, 2014 of the appeal from the district court's July 10, 2014 order, Ms. Merrigan ultimately filed her Renewed Amended Entry of Appearance in the Western District of Missouri on October 21, 2014, wherein she stated:

> Counsel noticed her appearance on Petitioner's behalf on August 5, 2014, (Doc. 81), for the limited purpose of appealing from the July 10, 2014 order. Ms. Merrigan continues her *pro bono* representation concerning the subject and substance of that dispute, *viz.* the conflict of interest of the Court-appointed attorneys against Mr. Christeson and the requirement of this Court to ensure substitution by conflict-free counsel. This representation continues to be governed by Mo. Prof'l Conduct Rule 4-1.2(c). Additionally, Petitioner qualifies for such limited representation under Prof'l Conduct Rule 4-1.2(d)(2) because counsel is representing him in her institutional capacity with the Saint Louis University School of Law. Ms. Merrigan filed her Amended Entry of Appearance. (Doc. 95).

App. 341a. The language in this Renewed Amended Entry of Appearance was included as fn. 2 in the Renewed Motion By *Pro Bono* Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel (App. 344a), which the district court denied and the court of appeals' judgment before this Court affirmed.

3. Written Request and Agreement from Mark Christeson to Counsel for Their Representation

As set forth above, undersigned counsel have previously withheld the improper disclosure of client correspondence in recognition of attorney/client privilege and confidentiality concerns, as expressed in briefing in the lower courts. In response to Justice Alito's ordered briefing, Ms. Merrigan reached Mr. Christeson by telephone and

received his consent to release to this Court relevant correspondence. A copy of Mr. Christeson's Retention Agreement with Ms. Merrigan and Mr. Perkovich and other correspondence from him is appended hereto, pursuant to Rule 32.3 of this Court. The following are relevant excerpts.

On May 14, 2014, Mr. Christeson wrote, *inter alia*:

> I know that I've already told you and Joe how thankful I am for your assistance, but I thank you both again. I honestly had started to lose hope. However, after speaking with the both of you that has actually changed. And I really hope the both of you get appointed to my case.

On May 15, 2014, Mr. Christeson signed and notarized a "Consent to Representation", wherein he stated, *inter alia*:

> I, Mark Christeson, understand that attorneys Joseph Perkovich and Jennifer Merrigan are filing a motion for appointment in the district court in my case, in order first to litigate the dismissal of my habeas petition as untimely. I consent to their representation. I also understand that they are not my lawyers, until the court appoints them.

On June 18, 2014, a fellow inmate typed for Mr. Christeson a letter to Ms. Merrigan expressing, *inter alia*:

> My attorneys (Butts and Horwitz) and I, also spoke of attorneys Joe Perkovich and Jennifer Merrigan. Attorneys Horowitz [sic] and Butts expressed their opinions that it would not be in my best interest if attorneys Perkovich and Merrigan represented me due to the fact that they were out of State attorneys. Attorneys Horowitz and Butts are afraid I will gets "lost in the shuffle of out of State lawyers." Attorneys Horowitz and Butts stated that attorneys Perkovich and Merrigan may not want to represent me pro-bono however, attorneys Perkovich and Merrigan have already agreed to do so. Attorneys Horowitz and Butts nonetheless expressed their opinion again that attorneys Perkovich and Merrigan did not have my best interest in mind and that I would be better off with attorneys from Missouri. I respectfully disagree. It was attorneys Horowitz and Butts that contacted attorneys Perkovich and Merrigan requesting their assistance with my case. I personally feel that attorneys Joe Perkovich and Jennifer Merrigan should be allowed to represent me. I truly believe that despite attorneys Horowitz and Butts's opinion, that attorneys Perkovich and Merrigan do have my best interest in mind and

> more so then Horowitz or Butts. In the short time that I have been in contact with attorneys Perkovich and Merrigan, they have gone out of their way to come and visit with me twice to discuss my case. They have been in constant contact with me by phone and through letters letting me know exactly what is going on and what they are doing on my behalf. In my opinion, it is attorneys Horowitz and Butts that do not have my best interest in mind. If they did they would have filed my Federal Habeas Corpus on time and I wouldn't be having to fight to get the court to allow me to do it now out of time. I truly believe that attorneys Perkovich and Merrigan have shown more passion and concern regarding my case than any attorneys thus fare and therefore, I feel it would be in my best interest if they were allowed to represent me.

As the foregoing reflects, Mr. Christeson's view about undersigned counsel representing him has been clear for months. Further, the assistance of inmate law clerks also reflects Mr. Christeson's struggle to replace his conflicted appointed counsel.

4. Contemporaneous Fellow Inmate Observations

In addition to the correspondence with Mr. Christeson, undersigned counsel received declarations from three fellow inmates that observed Mr. Christeson's position concerning representation by Mr. Perkovich and Ms. Merrigan.

Former cellmate Jonathan French stated:

> On April 4, 2014 I went to the Hole. . When I got back to PC, Mark told me things were being done on his case by new lawyers who had come to meet him while I was gone. Mark was very glad about this because he almost never even heard from his old court-appointed lawyers, Phil and Eric, and felt that they had never done anything to help him." App. 234a. French further stated: "Mark was even more positive than ever because he had the new lawyers digging into his case and showing him that they were doing so by talking to him often, sending documents they were filing, and also visiting him.

App. 235a.

Protective Custody law clerk William Harrison: "I only learned that Mark's lawyers had filed his petition untimely several months later, when he came back to me for

help. Mark said that his lawyers had not done anything for him and that new lawyers were trying to help him." App. 237a.

Prison Law Clerk, Ed Burgdorf stated:

> Mark was under the belief that his appeals were ongoing. It wasn't until about 4 months ago that Mark shared some of his letters with me and I realized the state of Mark's case. Mark did not realize his appeals were over. Only when Mark received he motions requesting different counsel, did it finally dawn on me what was happening with his case.

App. 229a.

CONCLUSION

As can be seen from the foregoing, Mr. Christeson had repeatedly urged Ms. Merrigan and Mr. Perkovich to replace his appointed lawyers before undersigned counsel ultimately were able to appear in the lower courts on his behalf and, now, before this Court.

For these further reasons set forth in this ordered briefing, this Court should grant Mr. Christeson a stay of execution and a writ of certiorari.

Respectfully submitted,
/s/Jennifer A. Merrigan

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October 28, 2014

CERTIFICATE OF SERVICE

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CAPITAL CASE
No. 14-6873

IN THE

Supreme Court of the United States

MARK A. CHRISTESON,
Petitioner,

v.

DONALD ROPER,
Superintendent, Potosi Correctional Center,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE ETHICS BUREAU AT YALE, LEGAL ETHICS PROFESSORS AND CAPITAL HABEAS CORPUS PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Ethics Bureau at Yale, a clinic composed of fifteen law school students supervised by an experienced practicing lawyer and lecturer, drafts amici briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools. Additional amici curiae are lawyers and scholars whose interests include the conduct of the judiciary and the codes that regulate judicial conduct.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, Petitioners and Respondents have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than Amici and their counsel has made a monetary contribution to the preparation and submission of this brief. In the underlying case, Mr. Fox previously submitted an expert witness affidavit on behalf of Petitioner.

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Paul Litton is the R. B. Price Professor of Law Professor of Law at the University of Missouri School of Law at Columbia. He teaches criminal law, death penalty law, jurisprudence, and bioethics. Before joining the University of Missouri faculty in 2006, he was law clerk to Chief Justice Deborah T. Poritz of the New Jersey Supreme Court, serving a second term as the Court's death penalty law clerk.

Joseph Luby has served as an attorney with the Death Penalty Litigation Clinic Kansas City, Missouri since 2001. He served as a judicial law clerk for Judge John R. Gibson of the Eighth Circuit Court of Appeals, and then for Judge Howard F. Sachs of the United States District Court for the Western District of Missouri. In 2009 he was awarded the Missouri

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Susan J. Becker is a Professor who teaches Legal Profession, Civil Procedure and other courses from a practice-oriented perspective at Cleveland-Marshall College of Law. She is a co-author of *The Law of Professional Conduct in Ohio* (Lexis-Nexis 2009-2010).

Sherman L. Cohn is a Professor of Law at Georgetown University Law Center. He has served for the U.S. Department of Justice from 1958 to 1965. From 1957 to 1958, he was a Law Clerk to the Honorable Charles Fahy, U.S. Court of Appeals for the D.C. Circuit. Professor Cohn was also the President of American Inns of Court from 1985 to 1994.

Joshua P. Davis is the Associate Dean for Academic Affairs, Professor, and the Director of the Center for Law and Ethics at the University of San Francisco School Of Law. Professor Davis teaches and writes, inter alia, in the areas of complex litigation and legal ethics.

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Judith L. Maute is William J. Alley Professor of Law at the University of Oklahoma College of Law in Norman, Oklahoma, where for over 25 years she has studied lawyers' fiduciary duties to communicate and comply with clients' lawful instructions. *See*, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. Davis L. Rev. 1049-1115 (1984).

James E. Moliterno is the Vincent Bradford Professor of Law at Washington & Lee University. He has taught lawyer ethics for over 30 years at six U.S. law schools and in seven other countries, and is author of several books on lawyer ethics issues, including *Cases and Materials on the Law Governing Lawyers* (2008).

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Keith Swisher is an Assistant Professor of Law at Arizona Summit Law School. He teaches Professional Responsibility and focuses his scholarship on legal and judicial ethics.

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Ellen Yaroshefsky is the Clinical Professor of Law and Director of the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo School of Law. She teaches a range of courses, sponsors programs and events that provoke critical thought on issues of legal ethics.

SUMMARY OF AGREEMENT

It is the view of amici that the conduct of Messrs. Butts and Horwitz fell far beneath the bare minimum standard of care, let alone the standard applicable in a capital case; that they not only committed malpractice and breached multiple fiduciary duties, but also abandoned their client long before they did anything meaningful pursuant to their appointment ; that they continued to violate their duties of loyalty and confidentiality; that, a fortiori, what they provided was ineffective assistance of counsel; and that they were required to withdraw from this representation years ago to avoid perpetuating an unwaivable conflict of interest. In adjudicating this case, this court has the perfect vehicle to establish the need for capital counsel to conform to critical fiduciary duties codified as court mandated rules in order to fulfill the constitutional standard of effective assistance of counsel.

A. The Lawyers' Incompetence is Manifest

The first ethical obligation of every lawyer is to be competent. In order to do that the lawyer has to conduct the necessary research in order to determine what the lawyer's obligations are. If undertaken correctly, one does not miss a one-year statute of limitations by 117 days. To be negligent is one thing; something far more reprehensible occurs when one not only misses a deadline by such a wide margin, but uses as an excuse for such a terrible result an argument that compromises the client's entitlement to relief. As one reviews the virtually incoherent defense of Mr. Christeson's counsels' conduct in the Court below, the conclusion that correctly characterizes their behavior is abject neglect.

It would be hard to imagine a more clear-cut case of abandonment. *See Holland v. Florida*, 130 S.Ct. 2549 (2010), the seminal case on equitable tolling, and *Maples v. Thomas*, 132 S.Ct. 912 (2012), the seminal case on abandonment. In the latter, the lawyers who were supposed to be handling the case had left the sinking ship. Here, from what amici can conclude, the lawyers never got on the ship in the first place.

Messrs. Butts and Horwitz needed to file the petition by April 10, 2005. (Doc. 62 at 5). They appear to admit that they did not meet with Mr. Christeson until May 27, 2005, over a month after his petition was due and nearly eleven months after the court appointed them. (Doc. 73 at 8). If they had gotten aboard the ship when appointed, they would have been on top of the deadlines that are so critical in habeas litigation — especially the crucial first deadline—and never more critical than when a person's life is on the line. If this was not abandonment, amici are not sure what would be.

B. The Lawyers' Conflict Required Withdrawal

In any case, it was vital for Messrs. Butts and Horwitz to protect Mr. Christeson's interests after the district court correctly identified that they had missed his filing deadline. It is apparent that, instead, they sought to keep from view any of the evidence of their abandonment through their belated and hapless actions, filing an out-of-time petition in August 2005.[2]

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[2] At the relevant time Eighth Circuit law clearly recognized that the one-year federal habeas limitations period was subject to equitable tolling. *Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000), a view confirmed by *Holland v. Florida*, 560 U.S. 631 (2010) which established the basic parameters for it.

As soon as they realized they had missed the deadline, however, they had an ethical obligation to confess error to the client, and immediately withdraw. Their abandonment created an on-going palpable conflict, a conflict that is manifest in their perpetuation of the abandonment by attempting to hide their misconduct and choosing to defend themselves at the expense of their client. And they did this despite the fact that their prompt withdrawal would have permitted replacement counsel to investigate and present to the district court compelling bases for equitable tolling.

Their obligation to confess error stemmed from their fiduciary duty of communication (Mo. R. of Prof'l Conduct 1.4), and upon their utter failure, after having initially abandoned him, to recognize the profound conflict of interest between the lawyers and their client that then arose, a conflict that is graphically demonstrated by reading the lawyers' filings.

If a lawyer's conduct gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that fact to the client. Restatement (Third) of Law Governing Law § 20 (2000). A lawyer who fails to file for a client before the limitations period has run must inform the client of the error, must inform the client of the possibility of a malpractice suit and further inform the client of the resulting conflict of interest that may require the lawyer to withdraw. *Id.*

Their obligation as lawyers for Mr. Christeson was to admit that they had abandoned him at the time of his greatest need. But rather than explain the situation to their client, amici understand they refused to cooperate with new unconflicted counsel, withholding Mr. Christeson's file and communications. They also

chose to defend themselves, cobbling together arguments that are difficult to understand and that provide no excuse, but ample evidence that the original abandonment was being compounded by an additional transgression. Mr. Butts and Mr. Horwitz actually argued to the court that they were *diligent* in filing Mr. Christeson's petition—117 days late—in direct contravention of their client's best interest, effectively seeking to preclude Mr. Christeson's equitable tolling claim by characterizing their unfortunate conduct in filing his petition as a conscious tactical decision.

The inescapable conclusion here is that the interests of the lawyers and the interests of the client, a client sitting on death row, were directly adverse. Under those circumstances, Mo. R. of Prof'l Conduct 1.16(a) demanded their immediate withdrawal. Instead, they have persisted in representing their client, even though in their representation of the client they were pursuing ends that were diametrically opposed to everything the client should be seeking, all the time also continuing to violate their ethical obligation of communication with their client.

For example, they represented to the court that they have contacted a psychologist and that Mr. Christeson had agreed to an evaluation, but the lawyers did not speak with Mr. Christeson about this matter until two days *after* they made this statement to the court.

By their own admission, Mr. Butts and Mr. Horwitz did not meet with Mr. Christeson until ten months after their appointment as his counsel, and long after his statute of limitations had run. Nevertheless, they persisted in attempting to persuade the court that their representation has been diligent and competent. To the contrary, this manner of abandonment could be grounds for disbarment. *See People v. Elliott*, 39 P. 3d

551 (Colo. 2000) (lawyer disbarred for abandoning two clients in violation of Rules of Professional Conduct 1.3 and 1.4 by agreeing to provide specific professional services, failing to provide the services and failing to protect his clients or to communicate with them regarding the matters he was handling), as could their misrepresentation of the chronology to the court.

In sum, it is troubling beyond explanation that these lawyers, in effect, argued in support of their client's execution.

C. The Lawyers Breached Their Obligation of Confidentiality

One measure of the conflict was these lawyers' use of client confidential information. Indeed their response to court order of May 27, 2014 (Document 73) goes into excruciating detail regarding their otherwise privileged communications with their client and the contents of the case file. *See id.* at 8-12, 15, 16. In doing so, they violated Mo. R. Prof'l Conduct 1.6 using the confidential information of their client without consent, not in aid of their client's cause, but in support of their own vindication. An assault on loyalty and confidentiality does not get more unethical or devastating than this.

It is true that under certain circumstances lawyers may use confidential information to defend themselves. But the "self- defense" exception is "limited ... because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." *Id.* The "self-defense" exception allows a lawyer to reveal confidential information only to respond to formal allegations in a proceeding where disclosing such information is

"reasonably necessary" to "defend against charges that [would] imminently threaten the lawyer ... with serious consequences," such as a disciplinary hearing or a malpractice suit. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c).

This was not one of those situations. They have revealed privileged attorney-client communications in support of their self-serving argument that they have acted as competent, diligent lawyers throughout Mr. Christeson's representation. In doing so they violated the trust Mr. Christeson reposed in them by disclosing the confidential information without notice to the client, let alone seeking the client's informed consent, the ethical requirement because the self-defense exception did not apply.

CONCLUSION

The lawyers here did not just violate some hortatory guidelines for effective assistance of counsel. They did not just violate court-established rules of professional conduct, the violation of which could and should result in disbarment. They did not just violate these rules in connection with a capital case, as a result of which their client sits on death row, with an execution scheduled. No, they did all of that, dealing with a client of significantly diminished capacity, the victim of an accumulation of disadvantages, denied his right to federal review, not simply because his lawyers lapsed, but because his lawyers turned into his adversaries. It is on this basis that amici respectfully pray

that this Court grant review and remand this matter for further proceedings in which Petitioner will be represented by competent counsel to present his habeas claims.

Respectfully submitted,

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October 28, 2014

No. 14-6873

IN THE

Supreme Court of the United States

MARK CHRISTESON,

Petitioner,

v.

DON ROPER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF FORMER FEDERAL AND STATE JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*[1]

Amici curiae former federal and state judges respectfully submit this brief in support of petitioner Mark Christeson, and urge that the writ for certiorari and a stay of execution be granted.[2]

INTEREST OF THE *AMICI*

Amici are seventeen former federal and state judges.[3] They include trial and appellate judges from across the nation and the political and ideological spectrum. Notwithstanding their diversity, *amici* share a deep familiarity with the judicial system and a strong interest in maintaining its fairness and public legitimacy. These values are never more salient than in capital cases, where judges have the particularly heavy responsibility to ensure that the process is beyond reproach. *Amici* filed a brief in support of petitioner's motion for a stay of execution pending appeal in the court of appeals. *See* Pet. App. 412a-28a.

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[1] Pursuant to Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici's* intent to file this brief, which is filed more than ten days before its due date, and all parties consented to the filing of this brief.

[2] This brief relates to the petition for a writ of certiorari seeking review of the Eighth Circuit's order dated October 24, 2014, in court of appeals case number 14-3389.

[3] A complete list of the *amici* appears as an addendum to this brief.

The lower courts' rulings in this case undermine *amici's* interest in a fair criminal justice system. By denying petitioner's request for substitution of counsel under 18 U.S.C. § 3599(e) without an evidentiary hearing—indeed, without even addressing the conflict of interest at the heart of this case—the courts below endorsed the apparent abandonment and misconduct of petitioner's appointed counsel. If the status quo holds, petitioner will be executed without any meaningful federal review of his death sentence, even though he has made a substantial showing that conflict-free counsel would be able to obtain equitable tolling and thus consideration of the merits of his § 2254 petition.

This case also raises a separate concern relating to the administration of the death penalty. As states, including especially Missouri, have moved to execute inmates on death row after lengthy periods of delay, both the bar and the bench have been taxed by the demands of the process. This strain is likely why petitioner's appointed counsel—who clearly were not up to the task before them—were appointed in the first place, and why their errors were not caught before now. Cases, including this one, are falling through the cracks of the system. When the stakes are this high, such failures unacceptably threaten the legitimacy of the judicial process. The concern is only heightened when, as here, courts respond with indifference, or appear partial to the prosecution.

SUMMARY OF ARGUMENT

This Court should grant certiorari and a stay of execution so that petitioner may have an opportunity to have conflict-free counsel present his case for

equitable tolling of the Antiterrorism and Effective Death Penalty Act's statute of limitations.

The lower courts' decisions denying petitioner's motion are at odds with this Court's precedents, which hold that conflicts of interest constitute particularly strong grounds for substitution, and further require courts to at least *address* a petitioner's argument for substitution before ruling on his motion. Here, the conflict between petitioner and his appointed attorneys—who would have to argue their own egregious malpractice in order to obtain tolling for their client—warrants substitution (or at least an evidentiary hearing), and undermines all of the district court's stated rationales for denying petitioner's motion. By denying petitioner's motion without discussing the conflict, the lower courts abused their discretion.

Certiorari also should be granted because this case presents questions of national importance relating to the administration of the death penalty. The decisions below implicate the proper weight to give to conflicts of interest in substitution motions; the proper role of counsel in capital cases; and the proper role of the courts supervising those cases. Here, the lower courts set the terrible precedent that federal courts can reject a capital inmate's request for relief without considering the core of his argument, or even ensuring that his attorneys are capable of representing his interests. The rush to execute petitioner privileges finality above fairness, and this Court's review is necessary to restore balance to the administration of the death penalty.

ARGUMENT

I. The Decision Below Conflicts With This Court's Decisions.

1. The history of this case shows that the postconviction system has failed petitioner—an inmate of limited mental capacity who was raised in horrific circumstances and imprisoned since he was a teenager. *See* Pet. App. 346a-47a, 353a; *see also id.* 229a-31a (declaration of fellow inmate describing petitioner's lack of capacity). In his state postconviction proceedings, a judge whose term in office had already expired was assigned to petitioner's case. *See id.* 347a. That judge resolved the matter by signing, without editing, a 170-page order drafted by the prosecution. *Id.*

In these federal postconviction proceedings, petitioner's appointed lawyers failed to meet the deadline to file his § 2254 petition. Indeed, they did not even meet with their client until the deadline had already lapsed, and they ultimately missed the deadline by almost four months. *See* Pet. App. 384a. They then refused to argue for tolling of the statute of limitations when they had the opportunity, out of reticence to admit that their failure. *Id.* For years, they allowed petitioner to believe that his federal case was ongoing when it had, in fact, been dismissed as time-barred. *Id.* 385a-86a, 229a-31a. They did not withdraw from the representation, nor seek alternate representation for their client. As stated by legal ethics expert Lawrence Fox, who prepared a report in this case, appointed counsel's conduct can only be characterized as "abject neglect." *Id.* 131a.

It was only when appointed counsel finally sought outside assistance—seven years after missing the deadline—that their errors came to light and petitioner had the opportunity to challenge them. *See* Pet. App. 384a. The pro bono attorneys presently assisting petitioner raised appointed counsel's error in a thirty-four page pleading to the district court that was both thorough and respectful. *See id.* 2a-35a. Although the pro bono attorneys did not themselves demand to be substituted in as petitioner's attorneys, they offered to take the appointment if necessary. This notice was filed in May of this year, four months before the state of Missouri issued a death warrant in this case.

The lower courts' reaction to this sequence of events has been alarming. The district court repeatedly denied the pro bono attorneys' requests to appoint conflict-free counsel. But the district court *never addressed* the conflict of interest between petitioner and his appointed attorneys.

Instead, the court initially denied the request because it did not wish to appoint attorneys from Philadelphia and New York to represent an inmate in Missouri—even though there was no evidence that any qualified attorney in Missouri was available to take up the representation. *See* Pet. App. 169a. The pro bono attorneys requested reconsideration, and even offered to pay their own travel costs, but the court was unmoved. *See id.* 390a-91a. The matter went to the Eighth Circuit, which dismissed the appeal for lack of jurisdiction, reasoning that the pro bono attorneys lacked standing because at the time they had filed their initial notice, they were not formally representing petitioner. *See id.* 240a.

On remand, the pro bono attorneys promptly cured the standing issue by executing a retainer agreement with petitioner and refiling their motion. The district court again denied it, reasoning that the Eighth Circuit's mandate had not yet issued, and so it lacked jurisdiction over the motion. *See id.* 300a. The district court further signaled its hostility to the pro bono attorneys by directing that they were not permitted to file anything else in that court. *Id.* The pro bono attorneys thus sought and obtained an order from the Eighth Circuit directing the district court to allow them to file a renewed substitution motion now that the standing defect had been cured. *See id.* 339a.

The district court then denied the new substitution motion—again without mentioning the conflict that formed its basis. This time, the district court concluded that a denial would not be in "the interests of justice" for three reasons: (1) that the motion was untimely because it was filed seven years after the denial of petitioner's federal habeas petition and on the eve of his execution; (2) that petitioner's appointed attorneys had not abandoned him because they continue to represent him in various other proceedings; and (3) that permitting substitution would set a precedent permitting outside counsel to toll executions by second-guessing the performance of an inmate's attorneys. *See id.* 375a-76a.

The next day, the Eighth Circuit summarily affirmed without opinion and denied petitioner's motion for a stay of execution. *Id.* 448a.

2. Even cursory scrutiny reveals that the lower courts' decisions are deeply flawed. Most obviously, the strong showing of a conflict in this case—which the lower courts ignored—undermines all three of the

district court's rationales. The district court's reasoning is also flawed on its own terms.

Beginning with the conflict itself: in order to argue for equitable tolling, petitioner will have to present "extraordinary circumstances" that prevented him from filing in a timely fashion despite his diligent efforts. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). While mere attorney neglect, standing alone, may not satisfy that standard, this Court has held that "at least sometimes, professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651. This Court gave examples in *Holland*, explaining that "fundamental canons of professional responsibility . . . require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client." *Id.* at 652-53. In this case, petitioner's appointed attorneys sought to be appointed to represent him, and then apparently abandoned him out of the gate, getting involved in has case only after it was already too late. Their work was not "reasonably competent," they did not "communicate with their client[]," and they did not "keep their client[] informed of key developments." *See id.* What is more, as explained in the petition and stay application, petitioner's mental capacity to police his lawyers' conduct is virtually nonexistent. More than many, he was counting on his attorneys to exercise care in representing him—and was participating as diligently as he was able.

Petitioner's showing that his appointed attorneys failed to meet even basic standards of professional responsibility gives rise to a clear conflict because attorneys cannot be expected to argue their own negligence in an effort to obtain tolling for their client. *See Maples v. Thomas*, 132 S. Ct. 912, 925 n.8 (2012) (acknowledging that a "significant conflict of interest arose" between an inmate and a law firm when the inmate's "strongest argument" was that attorneys from that firm had abandoned him). The courts of appeals have recognized as much. *See, e.g.*, *Tabler v. Stephens*, No. 12-70013, 2014 WL 4954294, at *15 (5th Cir. Oct. 3, 2014); ("A significant conflict of interest arises if an attorney must argue that his own representation at an earlier stage of the litigation was ineffective."); *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013) (adopting as precedential *Gray v. Pearson*, 526 F. App'x 331, 334 (4th Cir. 2013), which held that "a clear conflict of interest exists in requiring . . . counsel to identify and investigate potential errors that they themselves may have made," such that a failure to appoint substitute counsel was "unsupportable by basic legal ethics principles" in case involving procedural default).

This Court has explained that under 18 U.S.C. § 3599(e), which governs the substitution of counsel in capital cases, substitution is warranted when it would serve the "interests of justice." *Martel v. Clair*, 132 S. Ct. 1276, 1284 (2012). This broad standard entitles the district court to consider an array of factors to determine whether substitution is appropriate. *Id.* at 1287. But conflicts of interest give rise to an especially strong case for substitution. As this Court explained, even independent of § 3599's

substitution provision, "a court would have to ensure that the defendant's statutory right to counsel was satisfied throughout the litigation; for example, the court would have to appoint new counsel if the first lawyer developed a conflict with or abandoned the client." *Id.* at 1286. Moreover, even the state in *Martel*—which advanced an unduly narrow and restrictive standard for substitution—acknowledged that conflicts of interest and abandonment would justify relief under § 3599. *See id.* at 1284. When, as here, an actual conflict of interest exists, courts should readily grant substitution motions.

3. Against these authorities, the decision below cannot stand.

Critically, neither the district court nor the Eighth Circuit ever found that a conflict of interest does not exist; nor did they find that the conflict has not prejudiced petitioner. Instead, the district court addressed peripheral points without ever explaining how they overcome petitioner's claim, and the Eighth Circuit issued no opinion at all. This Court has already held that "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer," and that a credible allegation that appointed counsel has engaged in misconduct "require[s] the court to make further inquiry before ruling on his motion for a new attorney." *Martel*, 132 S. Ct. at 1288. *See also Brown v. United States*, 720 F.3d 1316, 1336 (11th Cir. 2013) ("The trial court is obliged to explore the extent of the conflict and any breakdown in communication between the lawyer and the client."). By failing to consider or address petitioner's most compelling

argument for substitution, the district court abused its discretion.

Furthermore, neither court held that petitioner's motion for equitable tolling would be "futile" even if filed by substitute counsel. *Cf. Martel*, 132 S. Ct. at 1289. The state made this argument below, but neither court discussed it. That is unsurprising, because for the reasons set forth above and in the petition, petitioner's request for equitable relief would not be futile if his attorneys behaved as he alleges. And in any event, consideration of the ultimate merits of that motion would be premature at this point, because conflict-free counsel have not yet had a full opportunity to access the relevant case information and prepare a comprehensive presentation. *See* Pet. App. 345a (noting that "[c]onflicted counsel have withheld access to their file and any other relevant information bearing upon the circumstances *sub judice* and specifically their conduct and abandonment at critical junctures following their 2004 appointment"). Thus, there is no way that a court credibly can hold today that petitioner's motion for tolling would be futile.

As noted, instead of addressing the heart of the matter, the district court advanced three reasons to support its denial of petitioner' substitution motion: (1) timeliness; (2) appointed counsel's representation in other proceedings; and (3) concern that a ruling in petitioner's favor would set a broad precedent permitting outsiders to meddle in capital cases. *See* Pet. App. 375a-76a. None of these three concerns justifies denial of substitution in the face of a strong showing of a conflict.

With regard to the issue of timeliness, substantial evidence shows that the reason for the delay in filing has everything to do with appointed counsel's failure to disclose their error and to withdraw from the case. Indeed, there is even evidence that counsel have been concealing their errors from their client—or that, at a minimum, he has not comprehended their failure and its implications for his challenge to his sentence. Because the delay in this case is the product of the conflict of interest, it was error for the district court to rely on the former without even considering the latter.

Even putting the conflict aside, the district court's reliance on timeliness rings hollow. To be sure, it is *now* late in the day. But the original notice requesting conflict-free counsel was filed in May, four months before Missouri issued the death warrant—and as soon as possible after the pro bono attorneys discovered the violations in this case. Since then, the principal source of delay has been the lower courts, which have done everything in their power not to rule on the merits of petitioner's argument. And the state itself has not been in a hurry, until recently, to execute petitioner. His appeal from the initial dismissal of his claim was adjudicated in 2007, yet no death warrant issued until 2014. For the state now to assert a strong interest in finality is disingenuous.

The district court's second rationale is equally flawed because whether or not counsel abandoned petitioner in other proceedings is irrelevant if they have an intractable conflict of interest in *this case*. Conflicts of interest and abandonment constitute separate grounds for substitution of counsel—and the

court below erred by addressing one and not the other. Even putting that conflation aside, the appointed attorneys *did* abandon petitioner in this case. Indeed, they did not even meet with petitioner until the deadline had lapsed—and they failed to file anything on his behalf for 117 days past the deadline. See Pet. App. 132a (report of ethics expert Lawrence Fox stating that "if this was not abandonment, I am not sure what would be"). Through egregious neglect, the appointed attorneys thus scuttled petitioner's § 2254 petition—likely his best prospect for obtaining relief. *See Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (explaining that "[d]ismissal of a first federal habeas petition is a particularly serious matter"). In some ways, "abandonment" is too charitable a word for this conduct, because it suggests that at some point prior to the abandonment, the attorneys did something positive for the client. Here, the court-appointed attorneys commenced the representation by placing their client in the unenviable position of having to ask for equitable tolling.

Finally, granting substitution in this case would not set an "untenable precedent" because nobody is arguing for tolling on the basis of mere "second-guessing." *Contra* Pet. App. 376a. And nobody is suggesting that district court decisions regarding substitution do not warrant deference. Instead, an inmate must, at least, be able to set forth a *prima facie* case for substitution before a court should order a hearing. That was done here, yet ignored by the district court. It follows from this Court's command in *Martel* that the court failed adequately to consider petitioner's argument for relief, and thus failed to

fulfill its obligation as the court with jurisdiction over his petition.

Indeed, the district court's hostility to intervention from "outside attorneys" in this case is truly puzzling. It appears from the record that petitioner lacks the mental capacity necessary to evaluate the performance of his lawyers or instruct them as to the law. Moreover, for large portions of his sentence, petitioner has been in protective custody because he has repeatedly suffered violence and threats from other prisoners; thus, his ability to access other inmates who might aid him in his legal case has likewise been limited. So he cannot help himself. Nor can petitioner's appointed attorneys, who have a clear conflict of interest. And the courts below have all showed sympathy with the prosecution, and not petitioner. In light of those facts, it is unclear how the district court believes that grave errors—like the ones in this case—should properly be exposed and addressed. The attention of outside attorneys seems like the only viable avenue to relief, and so the lower courts' hostility to them—*e.g.*, the district court's refusal to consider appointing attorneys from New York or Philadelphia, the Eighth Circuit's decision that the outside attorneys lack standing to make arguments on petitioner's behalf, and the district court's subsequent decision barring the pro bono attorneys (who by then had been retained and were working for free) from filing any documents in the case—all suggests a desire to cover up appointed counsel's errors and move this case to execution before those errors may be addressed. But that is not how any case—let alone a capital case—should be allowed to proceed.

II. This Case Presents Questions Of National Importance.

This case presents multiple questions of national importance that this Court should address. First, it presents an important question regarding the salience of conflicts of interest in substitution motions. The lower courts' rulings effectively establish that in the Eighth Circuit, even a substitution motion raising a clear and acute conflict of interest may be denied in the interest of timeliness—even when the conflict itself gave rise to the delay. But § 3599, as interpreted by this Court, is not so harsh. This Court should grant certiorari to establish that a strong showing of a conflict of interest supersedes an attenuated interest in finality.

Second, this case furnishes a useful vehicle to articulate counsel's obligations in capital cases. In *amici*'s view as former judges, petitioner's appointed attorneys were plainly negligent, and his pro bono attorneys are acting in the best traditions of the profession. The appointed attorneys failed to meet relevant deadlines, made meritless arguments asserting their compliance, and ultimately have failed to represent their clients' interests in the courts below. The pro bono attorneys did everything in their power to bring the errors to the court's attention in a respectful, thoughtful pleading that seeks modest, but important, relief. Yet somehow, the courts below decided to reward the former and excoriate the latter. If this result is permitted to stand, it sends exactly the wrong message to the capital defense bar—a group whose work is critical to the fair administration of the death penalty.

Finally, this case presents an ideal vehicle to address the obligations of the federal courts in capital cases. The lower courts have, at every turn, refused to consider the meat of petitioner's argument for substitution: an argument that has been well-pled and substantiated. It would be tragic to permit the district court's most recent order to become the final word as to whether petitioner lives or dies, because it would suggest that federal courts are permitted, or perhaps even encouraged, to participate in a state's rush to execute an inmate before he has a chance to present his case for review. This Court can cure that misimpression by granting petitioner's application for a stay of execution and by adjudicating the merits of his claim. Petitioner's challenge to his sentence may or may not ultimately succeed. But our system would be broken indeed if it did not even provide him with an opportunity, assisted by conflict-free counsel, to present his case to a federal court. At a minimum, before our system allows petitioner to be executed, it should at least hear from attorneys who have his best interests at heart, and address his strongest arguments for relief.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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